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OF

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1940.

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Lord Hewart, Lord Chief Justice of England.

Sir W. A. Greene, Master of the Rolls.

Sir F. B. Merriman,	President of the Probate, Divorce, and Admiralty Division.
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JUDGES

OF

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE.

1940.

Lord HEWART, Lord Chief Justice of England, President.
Sir JOHN ANTHONY HAWKE.
Sir ERNEST BRUCE CHARLES.
Sir TRAVERS HUMPHREYS.
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ATTORNEY-GENERAL.

Sir DONALD BRADLEY SOMERVELL.

SOLICITOR-GENERAL.

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION

YOUNGMAN *v.* PIRELLI GENERAL CABLE WORKS, LIMITED.

C. A.

1939

Feb. 3, 6, 7, 8; *Apr.* 4.

Master and servant—Electrical installation—Construction by cable company—Electrocution of employee—Action by representatives of employee against company—Claims for negligence and breach of statutory duty—Evidence—Res ipsa loquitur—Whether company liable—Factory and Workshop Act, 1901 (64 *Vict.* & 1 *Edw.* 7, *c.* 22, *now repealed*), *ss.* 79, 105—*Factories Act,* 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 67), *s.* 129—*Electricity Regulations,* 1908—*Building Regulations,* 1926, *reg.* 45.

The defendants, an electric cable company, were constructing an electrical installation upon an area which was being laid out as a munition factory. Part of the installation consisted of four poles carrying live electric wires and standing near each other at the corners of a current-transforming station, and, in order to give them rigidity, fastened together near their upper ends by

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iron tie bars. An electric linesman employed by the defendants, under his foreman's orders, ascended one of the poles for the purpose of placing another wire in position, and when he was near the top of the pole a charge of electricity passed through his body causing his immediate death. The representative of the deceased man brought an action in the county court against the defendants claiming damages for his death on the grounds of negligence, and/or breach of the statutory duty of preventing their works from causing danger to their employees which was imposed upon them by Regulations under the Factory and Workshop Act, 1901, namely, the Electricity Regulations, 1908, or the Building Regulations, 1926, reg. 45. At the trial it was found that there was no evidence to show how the body of the deceased came directly or indirectly into contact with an electrically charged wire, or that the accident occurred in consequence of negligence, or, if it did, whose the negligence was :—

Held, by the Court of Appeal, affirming the decision of the county court judge, that, in the absence of evidence, there was no direct proof of negligence, and that in the circumstances the principle res ipsa loquitur did not apply as against the defendants ; and (Scott L.J. dissenting on this point) that, assuming that the Regulations applied to the place in question, there was no evidence sufficient to establish an infringement of any of them such as to have caused the accident ; and therefore that the action failed and the defendants were entitled to judgment.

APPEAL from the judgment of His Honour Judge Rowlands, at Beccles County Court.

At the date next hereinafter mentioned the defendants, the Pirelli General Cable Works, Ld., were constructing and operating certain electrical installations at Chorley, Lancashire, upon an area which was being laid out as a munitions factory. Part of the installation consisted of four poles, each about forty feet high, carrying live electric wires and standing near each other at the corners of a transforming station where a supply of current at 11,000 volts coming from outside the munitions area was, before reaching the posts, transformed down to 440 volts or less. (1)

The deceased, Arthur Youngman, was employed by the defendants as an electrical linesman, and was working for them at the construction of the said installations.

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(1) Additional facts regarding the installation and the circumstances of the deceased's death are stated below in the judgment of Scott L.J.

On July 13, 1937, the deceased, under his foreman's orders, ascended one of the said poles in order to place a further wire in position. He went up by means of climbing irons with a safety belt round the pole to save him from falling, and while he was near the top of the pole a charge of electricity at the voltage mentioned passed through his body, causing immediate death. (1)

The father of the deceased, as his representative (hereinafter called "the plaintiff") brought the present action against the defendants, under the Fatal Accidents Acts, claiming damages for his death on the grounds of (1.) the defendants' negligence either at common law or under the Employers' Liability Act, 1880, and (2.) breach of statutory duty imposed upon them by regulations made under s. 79 of the Factory and Workshop Act, 1901 (2), either the Electricity Regulations, 1908, or the Building Regulations, 1926. (2)

The defences to both the claims in respect of negligence, were denials of negligence, allegations of contributory negligence by the deceased, and allegations of volenti non fit injuria ; and the defences to the claims under the regulations were that the regulations did not apply to the place in question, that if they did apply the defendants had committed no breach of them, and, alternatively, that the defences to the negligence claims were also available to these claims under the regulations.

At the trial in the county court there was no evidence to show how the body of the deceased came directly or indirectly into contact with an electrically charged wire, or that the accident occurred in consequence of negligence, or if there was negligence whose negligence it was.

The county court judge found, as to the allegation of negligence, that in the absence of evidence there was no direct proof of negligence, and, further, that in the circumstances the principle res ipsa loquitur did not apply ;

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(1) See note (1), ante p. 2.

(2) The material provisions of the Factory and Worshop Act, 1901, and of the said regulations thereunder are sufficiently set out below in the judgment of Scott L.J.

and as to the allegation of breach of statutory duty, he assumed that the two sets of regulations applied to the locus in quo, but he found that there was no evidence sufficient to establish an infringement of any of the regulations such as to cause the accident; and he therefore gave judgment for the defendants.

The plaintiff appealed to the Court of Appeal. The appeal was heard on February 3, 6, 7, 8, 1939.

Comyns Carr K.C., *Alban Gordon* and *A. J. F. Wrottesley*, for the plaintiff, appellant. The man's death resulted from the negligence of the defendants at common law. That is the natural conclusion to be drawn from the facts admitted or proved, namely, that the man was set to work in the place where a high voltage cable passed about three feet from a metal tie bar with an earth wire, that if parts of the man's body came in contact simultaneously with the cable and the bar or wire the current would pass through his body, that no steps were taken by the defendants to prevent such an occurrence by insulation or otherwise, and that the man was killed by an electric shock. The plaintiff, by proving that the man's death was caused by a current following one or other of these possible courses, sufficiently satisfied the onus that rested upon him. The maxim res ipsa loquitur applies against the defendants. There was no contributory negligence by the deceased. The death of the deceased was due to the defendants' statutory breach of duty. The transformer station and also the building which was being erected was a " factory " within the meaning of s. 79 of the Factory and Workshop Act, 1901, or was a notional factory within s. 105, sub-s. 1, of that Act. It was a non-textile factory under s. 149, sub-s. 1, being an "electrical station " as defined by the Sixth Schedule, Part I., No. 20. That being so, the Electricity Regulations, 1908, made under the Act, apply to this station as being a factory, of which regulations, reg. 2 provides that all conductors shall either be covered with insulating material and further efficiently protected where necessary to prevent danger, or shall be so placed and safeguarded as to prevent danger so far as is reasonably practicable; and reg. 22 provides that adequate precautions shall be taken to prevent any conductor or apparatus from being accidently or inadvertently electrically charged when persons are working thereon. The defendants have committed breaches of the duties imposed upon them by both these regulations. The only one of the Building Regulations, 1926, made under the Act, which is here applicable, is reg. 45, which provides: "All electrical apparatus and electrical "conductors shall be so installed and protected as to prevent "danger to any person employed." It is plain on the facts of this case that the defendants did not comply with the requirements of that regulation.

Gilbert Paull K.C. and *J. H. C. Goldie* for the defendants, respondents. The maxim res ipsa loquitur does not apply to the present case. The mere fact that the deceased was killed by an electric shock does not entitle the plaintiff to invoke that maxim. The maxim implies negligence in the person against whom it is invoked, and the county court judge has found that there was here no negligence on the part of the defendants. The transformer station where the accident happened was not a "factory" within s. 79 of the Factory and Workshop Act, 1901; nor was it a notional factory within s. 105, sub-s. 1, of the Act. Sect. 79 speaks of machinery or plant used "in factories"; and s. 105 speaks of "premises on which" machinery worked by mechanical power is used for the construction of a building or any structural work in connection therewith. These expressions seem to show that the factory contemplated by these provisions is a building or limited space and not an extensive district like this munitions area. In *Pease* v. *W. J. Simms, Sons and Cooke, Ld.* (1), Humphreys J. expressed a doubt whether s. 105 applied at all to an extensive building site. In *Fenn* v. *Miller* (2) it was held by the Court of Appeal that in the Workmen's Compensation Act, 1897, the locality of the employment was not limited to employment on or in a factory because of the use of the word "about" which had an enlarging effect. In the Act of 1901 the words used are

(1) [1932] 1 K. B. 723, 731. (2) [1900] 1 Q. B. 788.

only " in " in s. 79 and " on " in s. 105. If the place here in question where the accident happened was not a factory within the meaning of the Act of 1901, then neither the Electricity Regulations, 1908, nor the Building Regulations, 1926, reg. 45, can apply to it because these regulations, made under the Act, are applicable only to factories actual or notional. Assuming, however, that these regulations are applicable to this place, there is no evidence to show that a breach of any of these regulations by the defendants was the cause of the accident, or indeed that the defendants committed a breach of any of these regulations. In *Wilsons and Clyde Coal Co.* v. *English* (1), it was held that it was the duty of an employer to provide a system of working which should not be dangerous to his employees; but it was not suggested at the trial of this case in the county court that the defendants had provided a system of working which was dangerous. Even if negligence was the cause of the accident, it must have been the negligence of a fellow-servant of the deceased man and the defence of common employment would be available to the defendants. The accident was due to the negligence of the deceased man himself in failing to comply with the Electricity Regulations by using rubber gloves and boots.

Alban Gordon in reply. This site was a factory within the Act of 1901. It does not differ from any other factory except in being larger. The whole estate was being used for the purposes of the munition work and it contained all the ingredients of a factory within the contemplation of s. 79 and s. 105 of the Act. Mechanical power was being temporarily used upon it for the purpose of the construction of a building within s. 105. The whole site when the work upon it is finished will form one factory. In *Andrews* v. *Andrews and Mears* (2) Buckley L.J. said in reference to the term " premises " in s. 105 of the Act: " That word implies "some definite place with metes and bounds, say land, or land "with buildings upon it." It cannot be said that this place was not a definite place with metes and bounds. In *Back* v.

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(1) [1938] A. C. 57.

(2) [1908] 2 K. B. 567, 570.

Dick Kerr & Co., Ld. (1), Lord Atkinson pointed out that in the case of factories, docks and such places, "the walls or "fences built around the factory or dock, as the case may be, "fix the boundaries and determine the area." It is to be observed that the case of *Pease* v. *Simms, Sons & Cooke, Ld.* (2), is distinguishable from the present case, since here the further the work went the more nearly did the installation become a factory, while there the further the work went the less did the place become a factory. This area as a whole being a factory, the regulations apply to it and to every part of it. It is submitted that the defendants contravened the regulations by rendering a safe system dangerous. In order that mechanism may be dangerous within the regulations it need not be necessarily dangerous in itself so long as danger may be reasonably anticipated from the use of it without protection: *Hindle* v. *Birtwistle* (3); *Walker* v. *Bletchley Flettons, Ld.* (4); and the judgment of Lord Wright in *Flower* v. *Ebbw Vale Steel, Iron and Coal Co.* (5) The facts show a breach of the regulations and more particularly of reg. 45 of the Regulations of 1926, and the learned judge drew a wrong inference from them.

Cur. adv. vult.

1939. April 4. SCOTT L.J. This is an appeal from His Honour Judge Rowlands, in which he in effect non-suited the plaintiffs, a father and mother, who claimed in the Beccles County Court, under Lord Campbell's Act and the New Procedure Act, 1934, in respect of the death of their son, aged twenty-six, an electrical linesman in the employ of the defendant company, on July 13, 1937. He was killed by an electric shock received when carrying out an order to fit an additional wire on the top of a tall post, already carrying three live wires, at a transformer station within the area acquired by H.M. Government for the site of their munition factory at Chorley in Lancashire, then in course of construction. The head contractors for the works of construction were Lindsay,

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(1) [1906] A. C. 325, 334.
(2) [1932] 1 K. B. 723, 731.
(3) [1897] 1 Q. B. 192, 195.
(4) [1937] 1 All E. R. 170, 175.
(5) [1936] A. C. 206.

Parkinson & Co., Ld. The defendant company were subcontractors for the supply and distribution of electric current at suitable pressure all over the site for the purpose of the head contractors.

The cause of action was alleged in alternative forms: (1.) negligence, either at common law, or under the Employers' Liability Act, 1880, and (2.) breach of statutory duty —namely, of regulations made under s. 79 of the Factories Act, 1901, either the Electricity Regulations, 1908, or the Building Regulations, 1926, which included one electricity regulation. The fact that the place was going to be a munitions factory had no relevance. The applicability of the Electricity Regulations depended on the place where the accident happened being a "factory" as defined by s. 149 of the Act and Part I. of the Sixth Schedule; and the applicability of the Building Regulations depended on the place being a notional factory by reason of s. 105, sub-s. 1. Whether it was or not was much in dispute at the trial, but that dispute was wasted labour for the Building Regulations did not concern the defendants.

My two colleagues are in favour of dismissing the appeal. I have read their judgments with great care, but am not able to agree in their final conclusion. I do not think the learned judge's conclusion can stand.

It was agreed between counsel that there should be a complete shorthand transcript of the whole of the trial and the learned judge agreed that the transcript should be treated as his note. The transcript in fact includes counsels' speeches and various discussions between counsel in the course of which various facts were mutually admitted by them.

This Court is faced with some difficulty in the appeal in that although the learned judge in his unreserved judgment discussed many aspects of the case, he gave only a cursory consideration to what I regard as the crucial issue, and he certainly did not make clear findings on all the facts. To some extent he took it for granted that the two counsel understood what the data of fact were upon which he was implicitly founding himself, and thought it unnecessary to make express findings. On the other hand I am satisfied that what I regard as the essential facts were established, and accepted by the learned judge or at least not doubted by him: and in the result I do not think it possible rigorously to apply to this appeal the normal rule of county court appeals that the appellant is limited to the trial judge's findings of fact; there are certain issues on which he made no definite finding, where none the less the facts were common ground.

The deceased was an experienced careful linesman who knew his work. The pole where he met his death was some forty feet high, one of four poles standing at the corners of the transformer station where a supply of current at 11,000 volts coming from outside the Government area was transformed down to 440 volts and 250 volts. In order to follow the problem raised by the issue about breach of the Electricity Regulations, as I see it, it is necessary to grasp certain structural and functional features of the part of the apparatus where the deceased was killed. The essential part of the apparatus consisted of transformer, conducting wires in and out, down from and back up to a height of some forty feet above the ground and four poles to carry the wires, its function was to bring in current at 11,000 volts and take it out again for distribution at appropriate lower pressures. The pole where the deceased met his death known as pole "D" carried only out-going wires. Two plans and a photograph were before the learned judge and the Court of Appeal—namely, a plan of the whole lay-out of the respondents' system of electricity supply over the area; an elevation plan of two aspects of pole "D" at right angles to each other; and a photograph of the transformer station, with its four poles, pole "D" being the nearest on the right. The first plan shows the general character and lay-out of the defendants' supply system; its only legal relevance in the action is that it portrays the position of the transformer station in the system. The elevation plan and the photograph enable the Court to follow the evidence about the nature of the apparatus where the deceased was killed from an electric point of view. The photograph shows the distributing wires running up pole "D." A few feet from the top of the pole there is shown a cross structure from one pole to the other running horizontally across. This cross-piece, as is seen from the photograph, consisted of two horizontal bars one above the other, cross-tied diagonally no doubt to give it rigidity. There was a quadrilateral of four such bars tying the four poles rigidly together. Each composite bar was made of galvanized iron, bare, that is not protected by insulation. It was known as a "tie-bar" or a "trussing-bar." Its designed function was mechanical, not electrical; in case, however, it should become at any time by inadvertence or any accident electrically charged, it was permanently equipped with an earthing wire attached to it in electrical contact, which would ensure the immediate passage of any such accidental charge straight to earth. The earthing wire of necessity was devoid of insulation on entering the earth; as a matter of fact it was uninsulated in its upper part also. I mention this as the circuit which killed the deceased was obviously capable of being established either through the tie-bar first and then through the earthing wire or immediately through the earthing wire. The pole in question carried three live wires, conveying current for power purposes from the transformer to electrically-driven machinery at some unspecified distance away, which was in use for building operations and other structural work, then being done by some 600 men in the employ of the head contractors or their sub-contractors. The transcript is not quite clear, but apparently this out-going current had a voltage of 440 volts; at any rate it was sufficiently high to be dangerous to life. These wires ran up the outside of the pole, the deceased being on the inner side. At the top they were led through porcelain insulators held in "D" shaped iron brackets and thence ran horizontally across country, suspended from a line of poles. All the way from the transformer to the top of the pole the conducting wires were inside insulated cables, and so continued for a couple of feet or so of their horizontal extension after leaving the porcelain insulators.

At that point they became " bare " (i.e., naked copper) wires. It was, of course, no part of the electrical design of the apparatus that either the tie-bar or the earth-wire should be intentionally charged; but I think it must be inferred from the undisputed evidence that it was a part of the design of the apparatus regarded as a unit that if the tie-bar did at any time through any cause become accidentally charged, the earth-wire should automatically and instantaneously restore it to zero potential by transmitting its charge to earth. It follows that if a man up the pole at the level of the tie-bar somehow made simultaneous contact with a live wire, or other piece of metal which happened from any cause in fact to be charged, and with either the tie-bar or the earthing-wire, he would at once complete the circuit, and cause a current to pass to earth killing him in its passage if of high enough potential. He might, for instance, put one hand on the charged metal when he had his other hand on tie-bar or earthing-wire: or vice versa. The same result would happen if the contact with the charged metal were made by any other part of the man's body—for example, his leg brought into contact by the spike of his climbing iron. The defendants called the workman who had, after the current was switched off, completed the task upon which the deceased had been engaged; but they called no one else. No manager, no designer, no expert who did examine or ought presumably to have examined after the casualty, was put in the witness box; and I shall have something to say later on on the question of onus of proof; but I am now concerned only to describe the electrical features of the case, so far as established by the evidence, in order to show that there was evidence of the possible danger. The first step in this indirect proof is perhaps to point out that this type of risk is expressly dealt with in the Electricity Regulations—which have been in force ever since 1908, and must be known by heart to every electrical contractor. The possibility of inadvertent charging is recognized as an important risk by Nos. 21, 22 and 23 of the Electricity Regulations; No. 21 positively requiring earthing-wires to be attached where necessary " to prevent "danger," No. 22 requiring "adequate precautions" to be taken to prevent accidental or inadvertent charging of apparatus, and No. 23 requiring the provision where necessary of "insulating stands or screens" to ensure adequate protection to men at work (see definition of such stands or screens on p. 2). These three regulations all assume the risk of conductors or unprotected metal parts becoming "accidentally "or inadvertently charged." I think it is a fair and indeed a necessary inference that it was the knowledge of that risk which made the defendants instal the earthing-wire. When I come to the scientific evidence given for the plaintiffs it will be seen that a positive opinion by their expert was expressed that this was how the death of the deceased was in fact caused; and it is my view that the learned judge accepted that evidence.

The story of what happened is short. The deceased man's foreman ordered him to go up the pole and add a fourth wire. He went up by means of climbing irons, with a safety belt round the pole to save him from falling, as far as the level of the tie-bar. Almost as soon as he got up, his assistant below, who was not watching him, heard a shriek and saw him lying collapsed across the bar. He was dead. It was common ground at the trial that he was killed by electric shock.

In the common law and Employers' Liability Act claims the cause of action was for negligence. The two causes of action only differ in that, if the learned judge held that no negligence was proved except that of a fellow servant (however high in grade) so as to make the defence of common employment an answer to the common law claim, the plaintiffs would still have their alternative remedy under the statute. The defences to both the negligence causes of action were denials, contributory negligence and volenti non fit injuria. The defences to the claim under the regulations were that they did not apply to the locus in quo, or if they did, no breach, or alternatively the same defences as to the negligence claims. The learned judge in the end, after a curiously confused trial, dismissed the action on the ground that he was not satisfied that the plaintiffs had proved their case on any one of the three alternatives. In regard to the regulations, although he indicated a disposition to hold that both applied at the place in question, he in fact gave no decision on that issue. He was content to assume their applicability, and held even so that they did not enable the plaintiffs to succeed.

I am not sure that I should have taken the same view as the learned judge did even on the negligence issue if I had tried the case, but I am not prepared to differ from my two colleagues on the final conclusion on that issue. I have, however, come to the conclusion that the judgment below cannot stand on the issue of liability under the Electricity Regulations. As much discussion took place below and before us upon the Building Regulations, No. 45 of which contains an electricity rule the language of which it was contended for the plaintiffs (perhaps rightly) would cover the present case, if those regulations applied, I will, whilst dealing with the Electricity Regulations, dispose of the question about the Building Regulations.

Under s. 79 of the Act of 1901 neither set of regulations can have any operation except within a " factory or workshop " —either actual or notional within the meaning of the Act; the present case is not concerned with " workshops." The words of the section are, that the Secretary of State having certified that "any machinery, plant, process or description "of manual labour, used in factories is . . . . dangerous to "life or limb . . . . may, subject to the provisions of this "Act, make such regulations as appear to him to be reasonably "practicable and to meet the necessity of the case." The Secretary of State did in fact in 1908 and 1926 respectively issue certificates and make the Electricity and Building Regulations of those years. Having regard to the wideness of the discretion so delegated to the Secretary of State, and bearing in mind the principles laid down by the House of Lords in *Institute of Patent Agents* v. *Lockwood* (1) in regard to the ambit of such discretion, I think two canons of interpretation apply: first, that full statutory force attaches to each regulation, when applicable, in accordance with the natural meaning of its language; and secondly, that each regulation should be construed in any given case where it applies on the footing that the question whether it is in itself "reasonably practicable," or "meets the necessity of the "case" (that is the case which the Secretary of State must as legislator be taken to have contemplated) has been already and finally decided by him under the power delegated to him by the last two lines of my quotation from s. 79, to the same degree and in the same sense that it would have been decided by Parliament had the Regulations been express sections of the Act. The limitation upon the power of the Secretary of State and upon the operation of the regulations imposed by the words "used in factories," appears prima facie to be satisfied in the present case by the terms either of s. 149, sub-s. 1, which makes an "electrical station," as defined by No. 20 of Part I. of the Sixth Schedule, a "non-textile "factory"; or of s. 105, sub-s. 1, of the Act, which provides that s. 79 shall have effect "as if any premises on which "machinery worked by . . . . mechanical power is temporarily "used for the purpose of the construction of a building or "any structural work in connection with a building were "included in the word 'factory'." The first paragraph of the Secretary of State's preamble to the Electricity Regulations follows the statute, and makes it a condition of the regulations applying in any place where the transformation and distribution of electrical energy is effected, that that place should be either (*a*) an actual "factory" within the meaning of the Act, or (*b*) "a place to which provisions of s. 79 of the Act "are applied by the Act"—which means a notional factory within s. 105, sub-s. 1. In my view the locus in quo plainly fell within (*a*) because electricity was being "transformed "for the purpose of supply by way of trade"—namely, under the supply contract between the defendants and the head contractors: and that made the place an "electrical station" within No. 20 of the Sixth Schedule, and therefore "a non-"textile factory" within s. 149, sub-s. 1, of the Act. Sub-s. 5 of s. 149 (that a site in the open air may still be a factory) helps to dispose of possible doubts. It is quite likely that the building operations which were being carried on by the head contractors did satisfy the terms of s. 105, sub-s. 1, and therefore did bring the transformer station within the territorial limits of that notional factory and did therefore satisfy the local conditions of the Act for both the Electricity and the Building Regulations. But the head contractors would be the occupiers of that " factory " and not the defendants; and that line of attack would not help the plaintiffs in their claim against the defendants under either set of regulations. The Building Regulations of themselves imposed no duty on the defendants towards the deceased. But if, as I think, the Electricity Regulations applied locally at the transformer station and personally to the defendants in their duties towards the deceased as their " employee," there is no need to trouble further with s. 105, sub-s. 1, or the Building Regulations. Much time was spent both below and before us on these legal issues, but as they are in my opinion irrelevant, I express no opinion upon them.

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(1) [1894] A. C. 347.

On the footing that the Electricity Regulations did apply, as I think they did, the next thing is to see what they provide. They begin by saying " it shall be the duty of the occupier "to comply with these regulations." There is no general definition of the word " occupier " in the Act, although there is inferentially in certain cases—for example, s. 104, sub-s. 1 (Docks), and s. 105, sub-s. 1 (Building Operations). In those two cases it is the person carrying on the processes and employing the workmen who is the occupier. And I think that that meaning of the word is shown by s. 130 to be applicable throughout the Act. In the Electricity Regulations there are four definitions and five regulations which are material. They are as follows:—

" *Definitions.*

". . . . ' Apparatus ' means electrical apparatus, and includes "all apparatus, machines, and fittings in which conductors "are used, or of which they form a part. ' Insulating stand ' "means a floor, platform, stand or mat of such size, quality, "and construction according to the circumstances of the use "thereof, that a person is thereby adequately protected from "danger. . . . . 'Covered with insulating material' means "adequately covered with insulating material of such quality "and thickness that there is no danger. 'Earthed' means "connected to all the general mass of earth in such manner "as will ensure at all times an immediate discharge of electrical "energy without danger."

"*Regulations.*

"1. All apparatus and conductors shall be sufficient in size "and power for the work they are called upon to do, and so "constructed, installed, protected, worked and maintained as "to prevent danger so far as is reasonably practicable. 2. All "conductors shall either be covered with insulating material, "and further efficiently protected where necessary to prevent "danger, or they shall be so placed and safeguarded as to "prevent danger so far as is reasonably practicable . . . . "21. Where necessary to prevent danger, adequate precautions "shall be taken either by earthing or by other suitable means "to prevent any metal other than the conductor from becoming "electrically charged. 22. Adequate precautions shall be taken "to prevent any conductor or apparatus from being accidentally "or inadvertently electrically charged when persons are "working thereon. 23. Where necessary adequately to prevent "danger, insulating stands or screens shall be provided and "kept permanently in position, and shall be maintained in "sound condition."

At the trial the appellants, as plaintiffs, were faced with a tactical position of some difficulty. Not having interrogated they had no prima facie case for establishing any of the causes of action sued on, and it was necessary for them to prove the facts out of the mouths of the defendant company's servants. For this purpose they called two linesmen and the foreman who had ordered the deceased up the pole, all three employed by the defendants. Possibly counsel expected more help from them, but the transcript shows that these witnesses failed to give any explanation whatever as to how the accident had been caused.

It appears from the transcript of Mr. Gordon's opening speech for the plaintiffs that the theory on which he was then relying was that the deceased man's climbing iron was in electrical contact with his leg, that the spike of it had dug into the pole and penetrated through the insulation of one of the live wires running up it at a moment when his hand was in contact with the iron tie-bar, so that the current was at once short circuited through his leg, body and hand, and thence to earth through the tie-bar and earthing-wire. And at that time Mr. Paull for the defendants accepted this theory except as to the channel for escape from the man's body to earth. How he supposed the circuit was completed he did not say. I will quote the passage: " (Mr. Paull:) May I say "that the cause of death is a matter of agreement. In fact, "I have the actual cable here. (Mr. Gordon:) What happened "was apparently this, that that spike dug a hole in this cable "that ran up the pole carrying 440 volts. The spike did that, "and there were certain scratches to be observed on the wire "at the time when the dead man's hands were on the trusses, "which are earthed. So a complete 440 volts circuit passed "through him and out to earth through his hand, which was "clutching the earth on the pole. That, so far as we know, "was how he met his death. (Mr. Paull:) May I say that "I agree with that, with one small exception; his hand was "not touching anything. The earth was down the pole, "which was dry and, therefore, provided in itself an earth. "I do not think it makes any difference, but I wanted to "point out that his hand was not actually touching anything. "(The Judge:) The important thing is that the iron spike went "through the insulators on the cable." After calling the two linesmen and the foreman Mr. Gordon closed the plaintiffs' case.

Mr. Paull, for the defendants, then submitted that there was no case, but upon the suggestion of the learned judge that he had better prove any facts he would want if his submission did not succeed, he called the linesman who had in fact carried out the deceased man's task immediately after his death, first, however, obtaining the leave of the foreman to switch off the current. This witness was probably the originator of the climbing iron theory of the cause. In the box he said that when he came down the pole he noticed a little burn in the insulation of what he called " the third wire " on the outside of the pole ; and he explained to the learned judge how, if the deceased was astride the tie-bar he might have put his leg round the pole and caused the perforation. So much did the witness believe in his theory that he had cut out the piece of wire and brought it to the Court, and this was the piece of wire to which Mr. Paull referred in the passage I have quoted. After calling this witness Mr. Paull closed his case, but warned Mr. Gordon that there was no evidence of " a factory." Mr. Gordon then called the Factory Inspector who described the place, for the vain purpose, evidently, of showing that the Building Regulations applied to the place as a factory within s. 105, sub-s. 1.

A legal argument then took place as to whether the evidence was or was not sufficient for that purpose. At the close of this argument, Mr. Gordon, for the plaintiffs, asked and was given leave to call another witness. Mr. Thomas, an expert electrical engineer, then gave evidence. He exploded the leg-iron theory by pointing out that had the accident happened in that way the wire would have shown signs of an " arc " of current having occurred, whereas it showed none, but only scratches made by a knife. The learned judge accepted this witness's evidence, and the leg-iron theory went out of the case.

The reason why I have narrated this irrelevant incident at the trial is this. Whilst the theory held the stage it became common ground (1.) that from whatever source the electric current entered the unfortunate man, it made its exit from him by the tie-bar and earthing-wire (see transcript, p. 73) ; (2.) that had the tie-bar been insulated—for example by a wood covering—the circuit would have been broken and no harm would have come to the deceased by his contact with a charged source : as I see it the bar would then have functioned in the same protective way as an " insulated stand " (see definition in the regulations) ; and (3.) that the reason why an earthing-wire had been electrically connected to the tie-bar was precisely that very possibility of the tie-bar becoming from some unexpected and undiscovered cause charged with current at a dangerous potential. On this sort of danger regs. 21, 22 and 23 throw light.

Mr. Thomas expressed the opinion in popular language, as appears from the transcript—that the source of current must have been " leakage "—that is escape from a charged source through defective insulation (the very risk to which those Electricity Regulations are addressed); and this inference from the facts I think was in the end accepted by the learned judge. In the judgment as set out in the transcript there occur these findings of fact: " Therefore, I am in this "uncertain position; I cannot say that his death was caused "through the use of climbing irons; the evidence does not "satisfy me of that. Another suggestion was that he was "sitting astride that iron stay we have heard about, and "that iron stay was connected with the earth-wire which, "of course, ran down the pole to the earth. It is suggested "that perhaps he touched the live wire up above his head "before it got to the insulator, or whatever the technical "term is. As against that theory, we have the direct evidence "of a fellow workman, the man who afterwards went up to "finish this poor man's job. He said that if you were on that "iron stay you could not reach it. At any rate, the evidence "does not satisfy me that the accident happened in that "way. He (sc. Mr. Thomas) said there must have been a "leakage of the current somewhere. I should think, if, in "fact, this man died as the result of an electrical shock, that "there must have been a leakage somewhere." There is one additional point to be borne in mind. The defendants gave no evidence that they had made any scientific investigation into the cause of the casualty, or even any inspection.

It is to the above state of facts that the Electricity Regulations have to be applied. I have already quoted the relevant parts—namely, regs. 1, 2, 21, 22 and 23: No. 22 is the most important; 21 and 23 are chiefly important because of the light they throw upon 22. In construing them one should, I think, remember that the risk of instantaneous death from a danger which is in its nature invisible is a likely reason for the Secretary of State in his discretion thinking that the object of the statute could not be achieved by anything short of an absolute duty. In my view regs. 1 and 2 did put upon the respondents an absolute duty to prevent danger, at least unless they could prove that it was not "reasonably practicable" to do so. Reg. 22, however, omits that proviso and calls for "adequate" precautions. As I construe this adjective the rule insists that the precautions shall achieve their object. If so, the duty so imposed is absolute.

On the issue of breach it is to be observed that no attempt was made by the defendants in evidence to prove that it was impossible or even impracticable to carry out regs. 1 and 2; and anyhow reg. 22 does not contain the proviso, and I think its terms would have made such evidence irrelevant.

I therefore come to the conclusion that, on the facts which I have already summarized as found or accepted by the learned judge, a breach of their statutory duties under these regulations was committed by the respondent company as "the occupier" of the "electrical station," which entitled the appellants to succeed on the issue of liability. The fact that the deceased was killed by an electric current when up the pole is, I think, in the circumstances of this case conclusive that there was a failure to provide the protection which the rules commanded. That the defendants did not know of the danger would, in my view, be no answer. They knew of the presence of the current in the wires at a voltage dangerous to life and limb; and that knowledge is of itself, in my view, enough to make all three rules apply. No doubt the foreman honestly thought it was safe for the man to go up; but he was mistaken, and I regard the risk of that kind of honest mistake by a person in authority as being one of the strongest reasons for the Secretary of State thinking that the preventive measures to be ordered should be of an absolute character. It is also a reason why if there be any ambiguity in the rules we should construe them as creating absolute duties and not mere qualified duties of care.

On a question of the meaning of one rule, cases about the meaning of other rules are of little value. But there are many illustrations of absolute sections of or rules under Acts, where the imperative need of ensuring safety makes it essential that the precaution to which the section or rule is addressed should be taken in any event and no loophole should be left to the discretion of those charged with its observance. The distinction between absolute and qualified statutory duties is well known—and I hesitate to cite detailed judicial interpretations of other statutory provisions. But the wording of the fencing section of the same Act, s. 10, is closely similar and that was construed as imposing an absolute duty in the leading case of *Groves* v. *Lord Wimborne.* (1) There the main issue was the right of an individual injured by breach of the statutory duty to sue for damages; but there were important pronouncements on the absolute character of the duty created. A. L. Smith L.J. said (2): " In the present case, which is an "action founded upon the statute, there is no resort to "negligence on the part of a fellow servant or of any one else. "There being an unqualified statutory obligation imposed "upon the defendant, what answer can it be to an action for "breach of that duty to say that his servant was guilty of "negligence, and therefore he was not liable? The defendant "cannot shift his responsibility for the performance of the "statutory duty on to the shoulders of another person." It is true that those observations were addressed to an argument about common employment, but they state the learned Lord Justice's view that the section was to be construed in an absolute sense. Rigby L.J. said (3): " Where "an absolute duty is imposed upon a person by statute it "is not necessary, in order to make him liable for breach of "that duty, to show negligence. Whether there be negligence "or not, he is responsible quacunque via for non-performance "of the duty . . . . There has been a failure in the per"formance of an absolute statutory duty, and there is no need "for the plaintiff to allege or prove negligence on the part of "any one in order to make out his cause of action."

The same principle of interpretation is, I think, clearly expressed in the course of the opinions delivered by the noble

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(1) [1898] 2 Q. B. 402.
(2) Ibid. 410.
(3) Ibid. 412, 413.

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Lords in *Lochgelly Iron and Coal Co.* v. *M'Mullan* (1), although there it was not the distinction between breach of statutory duty and negligence which was in issue, but whether the phrase in s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, " personal negligence " of the employer in that context did not cover a breach of statutory duty. My colleagues attach importance to the judgment of du Parcq J., as he then was, in *Walker* v. *Bletchley Flettons, Ld.* (2), a case turning upon the word " dangerous " as applied to machinery in s. 10 of the Factory and Workshop Act, 1901—the fencing section. I am disposed to agree with it, but I do not think that there is anything in it which is inconsistent with the views I am now expressing.

In the course of his judgment the learned county court judge referred to the defences of " volenti non fit injuria " and contributory negligence. He does not in his discussion keep the two defences clearly separate, nor does he in considering them, distinguish between the two causes of action to both of which they were put forward as answers—namely, breach of statutory duty and common law negligence. To the former the volenti defence is no answer in law (see *Baddeley* v. *Earl Granville* (3)); and in any event it is obvious that the workman no more understood the risk he was taking than the foreman who sent him up.

In so far as the learned judge seems to have treated the defence of contributory negligence as equally applicable to a breach of the Electricity Regulations, I must add a few observations on what he says, from the two angles of fact and law. On the former the judge accepts the evidence of the foreman as recorded in the transcript of the proceedings —namely, that " the deceased man was a particularly good "man and a thoroughly experienced and capable man." The witness then says (in relation to the negligence cause of action) that he thinks the act of ordering the man up without switching off the current was the only evidence of negligence available to the plaintiffs, adding " if that can be

(1) [1934] A. C. 1.
(2) [1937] 1 All E. R. 170.
(3) (1887) 19 Q. B. D. 423.

"regarded as negligence in itself"; but if it was negligence, he thought that for the same reason the deceased was guilty of contributory negligence. That view must be wrong on the facts. Obviously the deceased could not of his own motion, without permission, shut off the current and bring the 600 men employed on the premises to a sudden standstill. And indeed the linesman who after the accident did the work which the deceased had been ordered to do, obtained permission before switching off the current. The learned judge then reverts to the issue, and there treats it as on the footing of a defence of volenti. He rules out the theory that the death was caused by the man not wearing rubber boots and gloves, and I need say no more about that, except that the foreman must on the evidence be taken to have assented to what he saw the man was about to do—namely, to go up without rubber gloves and boots and without first getting a ladder from the store half a mile away. Neither of the two men thought there was any danger in the absence of those precautions. The statutory fault was that the respondents' system was wrong in that the necessary structural precautions were absent on which it is my intention to follow the principles laid down in *Wilsons and Clyde Coal Co.* v. *English.* (1) On my conclusion (rejected by both my colleagues) that the plaintiffs have a good cause of action for the breach of statutory duty, I cannot see how it can be said that there was any evidence of contributory negligence which was truly relevant.

I am alive to the difficulty in the way of any free discussion in this Court of the legal relationship between an action for breach of statutory duty and the doctrine of contributory negligence, which is created by previous decisions of this Court; and therefore say little. But the phrase "contributory "negligence" is not wholly free from ambiguity; and to a breach of such duties as are imposed by the Electricity Regulations it is not easy to think of any form of negligence short of wilful misconduct or conduct which in the actual circumstances amounted to a breach of some other statutory duty imposed on the employed person, which could afford

(1) [1938] A. C. 57.

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an answer; and on that question as raised by the present case I desire respectfully to subscribe to what Lord Wright said obiter in the case of *Flower* v. *Ebbw Vale Steel, etc., Co.* (1) I cannot think that on the issue so stated I am precluded by my duty to the Court of Appeal from relying on the noble Lord's reasoning in that passage.

There is one last point to which I must refer. Even assuming that my construction of the regulations gives them too absolute a meaning, and that it was incumbent on the plaintiffs complaining of breach to prove affirmatively that the defendant company knew or ought to have known not only of the presence in the plant of high pressure electricity, but also that there existed some element of danger, I still think the evidence was sufficient to discharge this greater burden of proof and to throw the whole onus on to the defendants. My reason is that on the specific facts in evidence which I have already pointed out, it must be inferred that the defendants knew or ought to have known that there were chances (1.) of the tie-bar becoming charged and the earth-wire being required to convey the current to earth, and (2.) of a man up the pole in contact with the tie-bar at the same time making a contact with a charged part of the plant and thereby creating a circuit through his own body to earth. That part might be either a naked wire or some metal surface which by some accident (i.e., a "leak") had become unintentionally charged. The deceased was a very experienced man. The evidence of the expert was quite definite to the effect that he was forced to the conclusion that there had been a "leak" of current; and the learned judge, I think accepted his evidence in that sense. I am not an electrical engineer, but the witness was, and I find it difficult to follow why my colleagues do not see their way to act on that evidence. The fact that they both disagree with me makes me diffident, but I am bound to express the conclusion I have reached. In the circumstances it seems to me that the rules were broken even if they were not absolute but qualified to the extent I have (contrary to my own view) supposed, so as almost to make applicable to its interpretation a construction analogous to that put on s. 10 of the Factory and Workshop Act, 1901, by du Parcq J. (as he then was) in *Walker* v. *Bletchley Flettons, Ld.* (1)

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(1) [1936] A. C. 206, 214–6.

This reasoning would seem logically to lead to a different conclusion on the claim based on negligence, and that view is strengthened if what I have said about the shifting of the onus to the defendants is well founded. That is no doubt true; but the plaintiffs' case on negligence was not run on those lines in the Court below; and the defendants may well have been misled, and possibly may have abstained from calling witnesses who could give relevant evidence on it, but who were not needed in the view Mr. Paull took of the plaintiffs' case on breach of statutory duty. If so it would be unfair to reopen that case now.

For the above reasons I think the appeal should be allowed and judgment on the issue of liability entered for the appellants, and the case remitted for assessment of damages; or at least that there should be a new trial; but as my brethren both differ from me it will be dismissed with costs.

FINLAY L.J. The judgment which I am about to read is the judgment of CLAUSON L.J., with which I agree.

This is an appeal by the plaintiffs from a judgment of Judge Rowlands in the county court at Beccles in an action remitted from the High Court. His Honour gave judgment for the defendants.

The plaintiffs sue under the Fatal Accidents Act as representatives and relatives of one Arthur Youngman, who, while working for the defendants as an electrical linesman, was killed by an electric shock. The claim is based in the first place on negligence, and in the second place on breach of statutory duty.

At the date of the death of the deceased on July 13, 1937, the defendants were constructing and operating certain electrical installations at Chorley in Lancashire upon an area which was being laid out as, and was to some extent, at least,

(1) [1937] 1 All E. R. 170.

in course of construction as, a munitions factory. Part of this installation consisted of four poles in close proximity to one another carrying certain live electrical wires charged with current of about 440 volts. The deceased under his foreman's orders ascended one of the poles in order to place a further wire in position. While he was near the top of one of the poles something occurred, the result of which was that a charge of electricity at the voltage mentioned passed through his body causing immediate death.

A number of possible causes of the accident were discussed before the learned judge. It appeared, and there can be no doubt, that the death would not have occurred unless the body of the deceased, while in contact at one point with a conducting material, such as a metal cross-bar, with an earthed "conductor," came into contact at another point either directly or through some conducting medium with an electrically charged wire, in which case a circuit would be completed, and electrocution would ensue as it in fact did. There was, however, no evidence of how the critical contact occurred, or as to whether it occurred in consequence of negligence, or if negligence be postulated, whose the negligence was. In those circumstances the county court judge obviously could not treat the plaintiffs as having proved common law negligence; and the only question remaining on this part of the case was whether the principle of res ipsa loquitur could be applied with the result that on mere evidence of the death without more, and in the absence of, explanation by the defendants (which was admittedly absent), it could be held that negligence must be imputed to the defendants. The learned county court judge took the view that the principle of res ipsa loquitur was inapplicable; and I cannot differ from his conclusion, if only because the only fact proved, the electrocution, is perfectly consistent with the not unreasonable possibility of the deceased having carelessly touched an uninsulated live wire. If this were the fact it is obvious that the electrocution could be attributed to the defendants' negligence only if it could be predicated that the presence of an uninsulated live wire in an electrical installation is of itself evidence of

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negligence. No attempt was made to prove or indeed even to suggest such a thing.

It was at one time suggested that it was negligence to permit the man to go up the pole until the current had been turned off, an operation which was physically possible. The learned county court judge, however, held that this was not negligent and that in any case the dead man knew of the possibility of switching off the current and was content to take the risk, if any, of ascending the pole without the current being switched off.

It appears to me that the learned county court judge was fully justified in finding that the plaintiffs had failed to prove negligence; in any case it is, in my view, impossible to impute to him any error of law in so finding.

It remains to deal with the claim based on breach of statutory duty. This claim was put forward on the basis that the Electricity Regulations of December 23, 1908, and the Building Regulations, 1926, made under the Factory Acts, applied to the locus: this depends upon whether the locus falls within the description of the premises in respect of which Regulations may by virtue of s. 105 of the Act of 1901 be made under s. 79 of the same Act. The learned county court judge assumed this point in favour of the defendants, and I am prepared to do the same, merely observing that the evidence as to the premises in question was meagre in the extreme, and that it is questionable whether it was sufficient to establish affirmatively that the locus in question falls within s. 105. Before the learned county court judge a number of regulations were referred to as having possibly been infringed, and in each case His Honour found the evidence insufficient to establish infringement, or at all events to establish infringement which caused the accident. I do not, however, find it necessary to deal with these regulations in detail, because in this Court counsel for the appellants were content to rest their case on the last three lines of No. 45 of the Building Regulations, 1926. The words are: "All electrical apparatus and electrical "conductors shall be so installed and protected as to prevent "danger to any person employed." It was not suggested that

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it would be sufficient evidence of a breach of this regulation merely to show that a person had in fact been electrocuted. I understood counsel for the appellants to admit, and in my view rightly, that the regulation might (following a suggestion made by du Parcq J., as he then was, sitting in the King's Bench Division, in a somewhat similar case) be properly paraphrased as follows: "All electrical apparatus and "electrical conductors shall be so installed and protected as "to prevent them being a possible cause of injury to an "employee acting in a way in which an employee may "reasonably be expected to act in circumstances which may "reasonably occur." If this be the correct construction of the regulation it is, in my judgment, impossible to suggest that there was any evidence of a breach of the regulation. It is true that a witness gave it as his opinion that there must have been a leak of electricity; and if that means that electricity was available in an electrically charged body which would pass through the deceased's body on contact being made between the deceased and the electrically charged body, the correctness of the opinion is obvious. If it means that there was some defect in insulation occasioned by faulty workmanship or wear or tear or bad lay out, the obvious comment (and it seems to me with all respect to the contrary view to be a sufficient one) is that this opinion is not shown to be based on fact or to be other than a mere guess.

For myself I find it, on this part of the case, quite impossible to reach any conclusion but that the learned county court judge was correct in holding that the plaintiffs had failed to establish a breach of the regulation and a fortiori had failed to establish any causal connection between the accident and any breach of the regulation.

The appeal should in my judgment be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Musson & Co.*

Solicitors for respondents: *James Turner & Son & Whitehouse.*

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Landlord and tenant—Arrears of rent—Distress for rates under justices warrant—" Execution "—Priority—Landlord and Tenant Act, 1709 (8 *Anne, c.* 14), *s.* 1—*Distress for Rates Act,* 1849 (12 *&* 13 *Vict. c.* 14), *s.* 1.

The levying of a distress for poor rates under a justices' warrant is an execution within s. 1 of the Landlord and Tenant Act, 1709, and consequently the party at whose suit the execution is sued out must before the removal of the goods from off the premises by virtue of such execution pay to the landlord of the premises the arrears of rent not exceeding one year's rent.

Appeal from a decision of the judge of the Wolverhampton County Court.

The following statement of facts is taken from the judgment of Goddard L.J.

The plaintiff, Mrs. Frances Mary Hickman, a widow, was the landlady of 366, Dudley Road, Wolverhampton, let on a quarterly tenancy to one Townsend at a rent of 5*l.* 7*s.* a quarter. The tenant got into arrears with the rent, and as the house was controlled under the Rent Restriction Acts, the plaintiff applied to the county court under those Acts on August 10, 1938, and obtained an order for leave to distrain, which, however, was suspended so long as the tenant paid 15*s.* per week off the arrears, and the rent as it became due. The tenant having made default, the plaintiff was on September 29, in a position to distrain for a sum agreed at 15*l.* 11*s.* Meanwhile on September 20, the defendant, as bailiff for the Corporation of Wolverhampton, levied on the tenant under a warrant of distress for rates granted by a justice of the peace for the borough on August 11, pursuant to the Distress for Rates Act, 1849. The plaintiff's solicitors on October 4 gave notice to the defendant that their client claimed the amount due for rent as a first claim on the assets, by which was obviously meant the proceeds of the sale of the distress, and, as the defendant refused to recognize this claim, this action was brought. The plaintiff's claim was based on the Landlord and Tenant Act, 1709 (1), 8 Anne, c. 14 (c. 18 in the Revised Statutes), and the only point which fell to be determined was whether the levying of a distress for rates under a justices' warrant was an execution within s. 1 of that Act.

The county court judge held it was not.

The plaintiff appealed. The appeal was heard on July 13, 14, 1939.

A. T. Denning K.C. and *Geoffrey Lawrence* for the appellant. The plaintiff, as landlord, brought the present action against the defendant claiming the amount of her overdue rent, and relied in support of her claim upon s. 1 of the Landlord and Tenant Act, 1709. The county court judge held that the levy for rates was a distress and not an execution within the meaning of that section, and that therefore it was not necessary that the defendant, as representing the rating authority, should before removing the goods from the premises have first paid the plaintiff the rent due to her at the time of the seizure of the goods. The county court judge was wrong in so holding. The distress for rates was an

(1) The Landlord and Tenant Act, 1709, s. 1: "For the more "easy and effectual recovery of "rents reserved on leases for life "or lives, term of years, at will or "otherwise; be it enacted . . . . "that from and after [May 1, "1710], no goods or chattels what- "soever, lying or being in or upon "any messuage, lands or tene- "ments, which are or shall be "leased for life or lives, term of "years, at will or otherwise, shall "be liable to be taken by virtue "of any execution on any pretence "whatsoever, unless the party at "whose suit the said execution is "sued out, shall before the removal "of such goods from off the said "premises, by virtue of such "execution or extent, pay to the "landlord of the said premises or "his bailiff, all such sum or sums "of money as are or shall be due "for rent for the said premises at "the time of the taking such goods "or chattels by virtue of such "execution; Provided the said "arrears of rent do not amount "to more than one year's rent; "and in case the said arrears shall "exceed one year's rent, then the "said party, at whose suit such "execution is sued out, paying "the said landlord or his bailiff "one year's rent, may proceed to "execute his judgment, as he "might have done before the "making of this Act; and the "sheriff or other officer is hereby "impowered and required to levy "and pay to the plaintiff as well "the money so paid for rent as "the execution money."

" execution " within the meaning of s. 1 of the Act of 1709. There are certain exceptions to or limitations of s. 1, none of which are applicable in the present case. Sect. 8 of the Act provides that the Act shall not prejudice the Crown in levying or seizing such goods for debts due to the Crown. The Execution Act, 1844 (7 & 8 Vict. c. 96), by s. 67, introduced a qualification in respect of weekly rents. There is also an exception in respect of county court warrants under s. 160 of the County Courts Act, 1888. In the case of *In re Mackenzie. Ex parte Sheriff of Hertfordshire* (1) Lindley M.R. summarized the history of the law in regard to the rights of the landlord where goods of the tenant are seized under a writ of execution. According to that statement the Act of 1709 in effect impounded, for the landlord's benefit, the goods taken in execution. The landlord had a right to have the goods preserved as a security for one year's rent, though he could not require them to be sold for his benefit. Unless the landlord was paid his rent the Act might produce a deadlock. If the sheriff sold the goods and they were removed he was liable to an action by the landlord. So long as the landlord was unpaid the sheriff could not be compelled to sell the goods. Such were the strict rights of the parties. Hence it became the practice for the sheriff to sell and to pay the landlord; and the right of the landlord to be paid out of the proceeds of sale thus became recognized and established. It thus appears that the term " execution " as used in the Act of 1709 includes in effect a right not only to seize the goods but also to sell them for the benefit of both the landlord and the creditor: see also Ryde on Rating, 6th ed., pp. 846, 885, 903, 906 and 975, and the decisions there summarized.

The questions which are raised under s. 1 of the Act of 1709 are these: (i.) Whether the distress for rates is an " execution," or an " execution on any pretence whatsoever," or an " extent "; (ii.) whether the complaint and application by the rating authority to the justices constituted a " suit," and whether the execution can be said to have been " sued " out "; (iii.) whether the order of the justices was a

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(1) [1899] 2 Q. B. 566, 573.

"judgment" within the latter part of the section. The term "execution" in its ordinary meaning would cover a distress for rates, and the only questions are whether in this section the ordinary meaning of the term is cut down by any of the associated terms "judgment," "extent" or "suit." It is not cut down by the term "judgment" which is wide enough to cover an order of justices; nor by the term "extent" as that is a form of execution which has no application here, being now limited to leases; nor by the term "suit" which covers any proceeding in which a debt or obligation is being enforced.

[GODDARD L.J. The word "suit" originally and strictly meant the train of a party's witnesses.]

The term "execution" in s. 1 of the Landlord and Tenant Act, 1709, includes the levy of a sum by seizure and sale of goods under a warrant or authority issued out of a court of law: see *Swaffer* v. *Mulcahy*. (1) The term "suit" in the section means an application to the Court asking that such execution should issue. The word does not mean an action; a man who recovers judgment sues out an execution: see Co. Litt., vol. ii., 289*a*. It is stated in *Altham's case* (2) "that by release of all suits, executions are barred, for "none shall have execution without suit or prayer." The words "sued out" mean issued out by the Court. The word "plaintiff" in the last line but one of the section means the party at whose suit such execution is sued out. That word was construed in *Henchett* v. *Kimpson* (3) and Pratt C.J. said that "the statute shall have "a liberal construction; and the words 'party at whose suit "'the execution is sued out,' shall be construed to mean "either plaintiff or defendant, whose judgment and execution "it is." The words "execute his judgment" mean enforce the order which the Court has pronounced in his favour. The term does not limit the earlier word "execution."

In *Greaves* v. *D'Acastro* (4) where goods were seized under a capias utlagatum, the Court of Exchequer ordered that a year's rent should be paid to the landlord out of the moneys in the hands of the sheriff.

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(1) [1934] 1 K. B. 608, 628.

(2) (1610) 8 Co. Rep. 148*a*, 153*b*.

(3) (1762) 2 Wilson, K. B. 140.

(4) (1725) Bunbury, 194.

It was held in *Dixon* v. *Smith* (1) that where a sequestration issued out of the Court of Chancery the landlord was entitled to a year's rent, the sequestration being an execution within the equity of the statute. In *Brandling* v. *Barrington* (2) certain goods upon a farm were seized by virtue of a writ of pone per vadios against the occupier, issued out of the court of pleas at Durham, and were afterwards, upon his default, forfeited to the bishop who, by writ to the sheriff, ordered them to be assigned to the party at whose suit the pone issued, in satisfaction of his damages. The landlord brought an action against the sheriff, charging him with having removed the goods of the tenant from the premises in his occupation without having paid to the landlord one-half year's rent then due. Lord Tenterden C.J. held that the plaintiff was not entitled to recover, as the statute of Anne spoke of goods taken by virtue of any execution, and the process under which the sheriff seized and sold the goods was not process of execution on a judgment and, therefore, was not within the words of the statute. Littledale J. there (3) pointed out that " the writ of pone is not an execution, although "it may in some cases have the effect of an execution."

In *Rex* v. *Speed* (4) which was decided nine years before the Landlord and Tenant Act, 1709, was passed, Sir John Holt C.J. said : " When a statute says money ' shall be levied by " ' distress,' this is an execution." In *Hutchins* v. *Chambers* (5) the question was whether beasts of the plough were distrainable for poor rates. Lord Mansfield C.J. said : " The first question "is whether averia carucæ may be taken for a distress upon "the poor's rate, where there are other distrainable goods "sufficient. As to this—the solid distinction is that the "seising under the 43 of Eliz. and such like Acts of Parliament, "is but partly analogous to the common law distress (as "being replevisable, etc.) but is much more analogous to the "common execution (like a fieri facias, where the surplus,

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(1) (1818) 1 Swanst. 457.

(2) (1827) 6 B. & C. 467.

(3) Ibid. 478.

(4) (1699) 12 Mod. 328, 330.

(5) (1758) 1 Burr. 579, 588.

"after sale, shall be returned)." Lord Mansfield also cited an anonymous case in 3 Salk. 136, which says: "it was adjudged "that this common law exemption of utensils, tools, instruments of husbandry, etc., from distress, holds only in "distresses for rent-arrear, amerciaments, etc., but doth not "extend to cases where a distress is given in the nature of an "execution, by any particular statute (as for poor rates, etc.)." Lord Mansfield continued: "Therefore it [is] more analogous "to an execution than to a distress at common law; and there "(in cases of execution) averia carucæ may be distrained; "although there be other sufficient distress."

Lord Kenyon C.J. said in *Rex* v. *Benn and Church* (1): "The "payment of a poor rate, unless it be set aside, must be "enforced; and if the magistrates will not issue a summons "to the person who refuses to pay the rate, this Court will "grant a mandamus to compel them to do it; but a summons "must precede a warrant of distress, which is in the nature of "an execution." In *Harper* v. *Carr* (2) the Court held that justices of the peace do not act ministerially in granting a warrant of distress for non-payment of a poor rate, and that the case of allowing a poor rate was the single instance in which the justices acted ministerially.

The recovery of debts was part of the ordinary proceedings before justices. The jurisdiction of justices under s. 1 of the Summary Jurisdiction Act, 1848, is twofold: criminal under an information and civil under a complaint. Sect. 12 provides that every such complaint and information shall be heard, tried, determined and adjudged by one or more justices of the peace, and s. 19 provides that where a conviction adjudges a pecuniary penalty or compensation to be paid, or where an order requires the payment of a sum of money, it shall be lawful for the justice or justices making such conviction or order, to issue his or their warrant of distress for the purpose of levying the same. The Rates Act, 1849, provided that an order might be made for the payment of costs as well as for the payment of the rate. The recovery of water rates is part of the civil jurisdiction of justices, who can issue a distress warrant

(1) (1795) 6 T. R. 198.

(2) (1797) 7 T. R. 270.

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for the recovery of such rate: see Stone's Justices' Manual, 71st ed., p. 2109. There is no distinction between a distress warrant for the recovery of water rate and an execution upon a judgment recovered in a court of competent jurisdiction for a sum of money. This distress was an execution for the recovery of a poor rate. A writ of extent was a writ of execution against the lands and goods of a Crown debtor by means of which the payment of all debts of record due to the Crown could be enforced: see West on Extent; Blackstone's Commentaries, 4th ed., vol. iii., p. 420. "Extent" was a form of execution very like a distress for poor rate. There was a summons to show cause why execution should not be levied. There was no exemption except for Crown debts. A distress for poor rate is indistinguishable from execution upon a judgment. The landlord here having given notice to the officer making the distress that rent was due to him, the officer ought to have paid those arrears, and as he did not he is liable under the statute of Anne. The appeal, therefore, ought to be allowed.

R. M. Montgomery K.C. and *Peter Thorneycroft* for the respondent. The decision of the county court judge was correct and ought to be affirmed. The Landlord and Tenant Act, 1709, is now 230 years old, and no attempt has ever been made previously to make s. 1 of the Act apply to a distress for poor rates. It has never been even suggested that a distress for rates comes within the statute. There is a footnote on p. 108 of Stone's Justices' Manual, 71st ed., to s. 21 of the Summary Jurisdiction Act, 1848, to the effect that "The Landlord and "Tenant Act, 1709, s. 1, which requires the sheriff to pay the "landlord his arrears of rent before the removal of goods under "an execution, has no application to goods seized by a constable "in the execution of a justices' warrant of distress." That note, which has appeared in each edition of Stone's Justices' Manual since 1895, states what has hitherto been considered to be the law. The word "execution" in the statute of Anne has always been regarded as not including a distress for poor rates although a distress for poor rates is analogous to an execution. The statute of Anne does not apply to a distress for poor rates. The execution to which the statute of Anne refers was for a debt which could be recovered under an ordinary indebitatus count. The purpose of the Act was to get rid of fraudulent judgments which kept landlords out of their rent. Tindal C.J. said in *Taylor* v. *Lanyon* (1) that the statute of Anne "was "passed to protect the landlord against frauds which might be "committed by his tenants, particularly by those colluding "with creditors to issue writs of execution; for property so in "the custody of the law could not be distrained, and the judg-"ment creditor, by keeping possession for a length of time, "might seriously affect the interests of the landlord. The "statute, therefore, contemplated executions issued by third "persons, and not by the landlord."

A poor rate is not a debt and does not come within the indebitatus counts, and it cannot be recovered in an action. It can only be recovered by the method laid down in s. 4 of the Poor Relief Act, 1601, namely, by the overseers under a warrant from justices levying the rate by distress. That is a different kind of sum from that which is due as a debt from one person to another. If poor rate were a debt it could be recovered by action.

[Clauson L.J. The poor rate is a preferential debt under s. 33 of the Bankruptcy Act, 1914.]

The word " execution " in the statute of Anne only referred to debts which could be sued for in an indebitatus count. It has never been suggested that the word referred to a sum of money which could not be sued for. A saving clause in a statute cannot be used to extend the meaning of the enactment: see *Manchester Corporation* v. *Lyons* (2) where Jessel M.R. said: "Reference was made to the saving clause, but I do not con-"sider that a saving clause can be properly looked at for the "purpose of extending an enactment." Under s. 6 of the Increase of Rent, etc. (Restrictions), Act, 1920, no distress for the rent of any dwelling-house to which that Act applies shall be levied except with the leave of the county court; therefore a distress for rent cannot be turned into an execution because the landlord has to apply to the county court for leave to levy the distress. That is similar to a distress for poor rate under a justice's

(1) (1830) 6 Bing. 536, 544.

(2) (1882) 22 Ch. D. 287, 304.

warrant. It is clear from the decision in *Wimbledon Local Board* v. *Underwood* (1) that "distress" is not synonymous with "execution." In the statute of Anne the word "execution" was used in its proper meaning and not as including a distress for poor rates. In *Lee and Another* v. *Lopes* (2) Lord Ellenborough C.J. pointed out that a commission of bankruptcy had been sometimes called a statutable execution, but though it might be said to be similitudinary to an execution, it was not an execution. Lord Esher M.R. said in *Seaman* v. *Burley* (3): "But I do not think it is true to say that the "obligation to pay the rate is a debt. It is certainly not a "debt in the ordinary sense of the term. No one can bring "an action for it. It is a payment to be made in pursuance "of a public duty, which cannot be enforced by action or in "any other way than by proceedings before magistrates." McCardie J. also said in *McCreagh* v. *Cox and Ford* (4): "I "greatly doubt whether the obligation to pay rates constitutes "a debt at all . . . . It is not easy to see how an action "for poor rates would be framed nor who would be the plaintiffs. "Such an action is unknown. The statutes, moreover, give "a particular method of enforcing the liability for poor rates." The Legislature in passing the statute of Anne never intended that the word "execution" should cover a distress for poor rates. The statute was passed more than 100 years after the introduction of poor rates in 1601 and yet no reference to poor rates was made in the statute. The procedure for the recovery of poor rates is very special and is statutory. It is true that a distress for poor rates is analogous to an execution, but it has never been held to be an execution. Lord Mansfield in *Hutchins* v. *Chambers* (5) said that the seizing under the 43 of Elizabeth for poor rate was more analogous to an execution than to a distress at common law, but he did not say, as Mr. Williams had argued, that it was an execution. At the end of s. 1 of the Act of 1709 come the words "the said "party . . . . may proceed to execute his judgment," but in a distress for poor rate there is no judgment. This Court should not alter the practice that has prevailed for so many years, and should dismiss the appeal.

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(1) [1892] 1 Q. B. 836.
(2) (1812) 15 East, 230.
(3) [1896] 2 Q. B. 344, 347.
(4) (1923) 129 L. T. 567, 570.
(5) 1 Burr. 588.

A. T. Denning K.C. replied.

Cur. adv. vult.

1939. July 25. Goddard L.J. read the judgment of the Court (Scott, Clauson and Goddard L.JJ.).

After stating the facts set out above and reading s. 1 of the Landlord and Tenant Act, 1709, his Lordship continued: Before considering the meaning of the section, it may perhaps be as well to mention that the lien thus given to the landlord has been the subject of certain subsequent enactments. Sect. 67 of the Execution Act, 1844, limits the claim of a landlord in the case of weekly tenancies to four weeks' rent, and in the case of other tenancies for a term of less than a year, as in the present case, to arrears accruing during four such terms or times of payment. Sect. 35 of the Bankruptcy Act, 1914, modifies the Act of 1709 in certain respects where the goods of a debtor are concerned. These sections do not affect the present case.

By s. 160 of the County Court Act, 1888, it is provided that s. 1 of the Act of 1709 shall not apply to goods taken in execution under the warrant of a county court, but the landlord may give the bailiff notice of rent in arrear, and the latter is then to distrain for the rent so claimed as well as levy for the amount of the judgment, and out of the proceeds of sale is to pay the landlord four weeks' rent in the case of a weekly tenancy, two terms of payment for any other term of less than a year, and one year's rent in any other case. It seems, therefore, clear that execution in the Act of 1709 is not limited to the process of the superior courts, and levy by a county court bailiff would have been an execution within the Act of 1709 but for the provisions of this section, although at the time when the Act was passed the modern type of county court did not exist.

It is, indeed, remarkable that though the Act has been in force for two hundred and thirty years, there is no trace of any case in which the question which now falls for decision has ever been raised. Moreover, as far as researches of counsel can find, no text writer on the law of Landlord and Tenant has considered or mentioned it. In recent editions of Stone's Justices' Manual, a work of the utmost value as a manual of practice, and a mine of information on matters relating to the duties of magistrates, both in summary and indictable cases, but not a work of authority on the branch of the law we are considering, the editors have expressed the opinion that the Act in question does not apply to a distress for rates, but no reasons or authorities are advanced in support of this opinion.

It thus becomes necessary to get a clear conception both of a distress and an execution, the more so because, as will appear hereafter, the term "distress" has often been, and still is, applied to process which is a distress in name only, and is in reality an execution. A distress is a remedy probably as old as the common law itself. From its earliest history it always had two peculiar elements: it was a measure of self help, a remedy given by the law to the party for the exercise of which he required no permission from any court; and, secondly, that which was seized thereunder had to be held by the distrainer as a pledge or security, and no right of sale or of using the property seized was given to him. It was not till 1690 that a right of sale of a distress for rent was conferred by 2 W. & M., c. 5, while to this day animals distrained damage feasant cannot be sold to provide compensation for the distrainer. They can only be sold to recoup the distrainer for the cost of providing them with food and water, a duty which was laid upon him by the Cruelty to Animals Act, 1849. Distress has been the subject of many statutes, both by way of extending the remedy in favour of landlords and limiting it in favour of tenants and of persons, e.g., lodgers, whose property may be on demised premises. For the purpose of the present case it may be said that the most important enactments are those which have conferred exemptions from distress upon certain goods or chattels of the tenants. Thus, beasts of the plough were exempted unless no other sufficient distress could be taken, by the Act 51 Hen. 3, and by later legislation such things as wearing apparel, bedding, and tools have been protected, while at common law things in a man's actual use, such as a horse on which he is riding (*Storey* v.

Robinson (1)), or a loom in use by a weaver (*Simpson* v. *Hartopp* (2)), cannot be distrained; whereas goods belonging to others but on the tenant's land could, by the common law, be distrained (unless brought within certain definite exceptions in favour of trade); so that in modern times legislation has been passed to give protection to lodgers and others from the rigour of the law.

Compare this state of things with an execution. While there is no protection from the sheriff for beasts of the plough or the horse which the debtor may be riding, the sheriff could never lawfully seize goods which did not belong to the debtor, though they might be in his house. An execution is essentially the process of a court; it is the final step in a cause, and proceeds from a judgment. A distress has been said to be neither an execution nor a legal process, as no legal process is necessary, and a landlord may distrain with his own hands: see *Ex parte Birmingham and Staffordshire Gas Light Co. In re Fanshaw and Yorston.* (3) In the case of a judgment of a superior court, execution is effected by a writ issued by the court which has given judgment, directed to the sheriff, and if he or the undersheriff does not personally execute the writ, as in practice they never do, a warrant is issued by the sheriff to a bailiff to levy execution. It seems that the execution creditor may nominate to the sheriff a special bailiff to execute the writ, and in that case could nominate himself, but then he would levy by virtue of the sheriff's warrant, unlike the distrainer, who can, if he pleases, distrain by his own hand or by his appointed bailiff.

We have now to consider the nature of a distress for rates, which is a purely statutory proceeding. Now regulated by the Act of 1849, it had its origin in the first Poor Law Relief Act of 1601, which empowered the overseers to obtain a warrant from two justices of the peace authorizing them to enforce payment of rates and arrears by distress and sale of the offender's goods, that is, the goods of those who had failed to contribute as they had been assessed. This is probably the first occasion on which justices were authorized to issue a warrant for the recovery of money, and also the first time when a power of sale was conferred by statute in the case of what is called a distress. There the matter stood till the Act of 1849. The principal changes which that Act effected were that it enabled a warrant to be issued by one justice, it enabled the overseers to recover the costs of distraining, it provided for committal to prison for want of distress, and it prescribed the form of complaint, summons and warrant.

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(1) (1795) 6 T. R. 138.
(2) (1744) Willes, 512, 517.
(3) (1871) L. R. 11 Eq. 615.

What we have to determine is whether in 1709, when the Landlord and Tenant Act was passed, the levying of a distress for rates would have been regarded by the lawyers of the day, and therefore presumably by Parliament, as an execution. The first thing to consider is, did the issue of the warrant result from a decision of a court? No doubt in the reign of Elizabeth justices out of session acted far more as administrative and executive than as judicial officers, but Sir James Fitzjames Stephen has pointed out in his History of the Criminal Law that from their first institution a number of statutes have authorized, sometimes one justice, and in other cases two, to inflict penalties in a summary way on a great variety of offenders. So they must have been capable of forming a court of law. Then it was decided in *Rex* v. *Benn and Church* (1) and *Harper* v. *Carr* (2) that the issue of a distress warrant for rates was a judicial and not a ministerial act. These cases were decided in 1795 and 1797 respectively, but if in those years the issue of a warrant under the Act of Elizabeth was a judicial act, it must equally have been so in 1709. Why, then, was the process in 1601 called a distress? One rather tempting argument that suggests itself is that the warrant was directed to the overseers themselves, and not to a sheriff or other officer, and so the execution of the warrant, being left to the party obtaining it, was in that respect analogous to a distress. But probably the true reason is to be found in *Rex* v. *Speed*. (3) Both in the argument and in the judgment of Holt C.J. it appears that the process issuing out of such courts as a court baron and a court leet was called a distress.

(1) 6 T. R. 198.
(2) 7 T. R. 270.
(3) 12 Mod. 328.

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In the case of a court baron it is said there was no power to sell, though in the case of a court leet there was, as it was a Court of Record. So what more natural than that in giving power to an inferior court, not of record, the Leglislature should describe its process by the terms used for that of courts of similar standing? Moreover, in that case, decided only some ten years before the Act we are now considering was passed, and in which the 43rd Elizabeth was cited in argument, Holt C.J. (1) lays down in terms that "when a statute says "money 'shall be levied by distress,' this is an execution." Without going into deep research of old statutes, it is clear from that case that it was common to use the word "distress" in relation to sums of money to be recovered, even as penalties. The statute against deer stealing under consideration in *Speed's* case (1) apparently provided for a year's imprisonment in case of failure of distress to the value of thirty pounds. Even apart from the clear statement of the Chief Justice, it must be obvious that the levying of a penalty imposed by a court of criminal jurisdiction is a form of execution.

Next we come to the case of *Hutchins* v. *Chambers*. (2) The whole question there was whether beasts of the plough were privileged from distress for a poor rate, and it was held they were not. Lord Mansfield cited Holt C.J.'s judgment in *Vinkensterne* v. *Ebden* (3), a case of distress for tolls, and quotes with approval a passage in 3 Salkeld, p. 136, as follows: "This common law exemption of utensils, tools, instruments "of husbandry, etc., from distress holds only in distresses for "rent arrear, amerciaments, etc., but doth not extend to cases "where a distress is given in the nature of an execution, by any "particular statute; as for poor rates." Therefore, adds Lord Mansfield, "it is more analogous to an execution than "to a distress at common law, and there (in cases of execution) "averia carucæ may be distrained; although there be other "sufficient distress."

Now the Act of 1709 applies to any execution on any pretence whatsoever, and it is indeed difficult to see how a process can be

(1) 12 Mod. 328, 330.
(2) 1 Burr. 579.
(3) (1696) 1 Ld. Raym. 386.

for some purposes an execution and for others something different. It is true that the Act lays a duty on the party at whose suit the execution is sued out, and it is also true that it has been recently held in this Court that no action lies at the suit of the rating authority to recover rates, and that the only remedy is that given by the statute. But why may not the rating authority be the party at whose suit the execution is sued out ? To obtain the process—to use a neutral word—proceedings have to be begun in a court of competent jurisdiction ; the form of proceeding is prescribed in the Act of 1849. There is first a complaint by the overseers, for whom recent legislation has substituted the rating authority. A complaint is the appropriate method of starting proceedings before justices where an order and not a conviction is sought, just as proceedings in a county court are instituted by a plaint and in the High Court by writ. The complaint is followed by a summons, so that the justices may hear the respondent, and act judicially, and if the summons results in the issue of a warrant a levy takes place which the cases just cited decide is an execution. That execution, it would seem to follow, was sued out at the suit of the rating authority. It is to be remembered that courts of summary jurisdiction make many orders for the recovery or payment of money, sometimes by way of penalty, sometimes by way of debt or damages. The Summary Jurisdiction Acts, 1848 and 1879, contain a code of sections dealing with this, and always the process of execution is called distress. The Statutory Summary Jurisdiction Rules, 1915 and 1926, contain a schedule of forms, among them forms applicable to proceedings for the recovery of a civil debt. Form 80 is the complaint, form 81 the summons, form 83 is the judgment, which states that it is adjudged that the defendant pay a sum for debt or damages, and form 86 is the distress warrant. It would be hardly possible to argue that process under that warrant was not an execution sued out at the suit of the complainant. The reality is that this process issuing from justices is distress in name only, and is in fact execution.

It is, however, necessary to say a word with regard to

Brandling v. *Barrington* (1) especially as the town clerk relied on this case in the correspondence before action as showing that the Act did not apply. When properly understood, that case decided no more than that the Act did not apply to an execution levied by way of mesne process. The writ of pone per vadios was the equivalent in the Chancery Court of the County Palatine of Durham to the writ of distringas in the Courts at Westminster. It was a method of compelling appearance. The sheriff was commanded to put the defendant by gages and safe pledges that he be before the court to answer the plaintiff's claim. The sheriff obeyed the writ, as he did the writ of distringas, by attaching the defendant's goods. If the latter appeared, the goods were at once released pending trial, but if he was in default the goods were forfeited, and no doubt the plaintiff thereby got satisfaction. But, as Littledale J. put it, the writ was not an execution, though in some cases it may have the effect of (that is, the same result as) an execution. The Court held that the execution must be one following a judgment, and not one merely to compel appearance. That decision affords no assistance in the present case. The final decision of justices in a matter in which they have jurisdiction is as much a judgment as that of any other court. Having decided that the person summoned is liable to pay the rate, they issue their warrant for the execution of their judgment ; the resulting process has none of the characteristics of distress ; it is execution pure and simple.

It remains for us to deal with what was the main strength of Mr. Montgomery's argument, that this point had never been taken in the two hundred and thirty years during which the Act has been in force. Now, this is not a case in which an appellate court is asked to reverse a decision of long standing on the faith of which persons have acquired rights and ordered their affairs. It is one in which we have to decide for the first time a question which might well have arisen before, but never has. It is fruitless to attempt an inquiry as to the reason for this silence, not only of decided cases but of text writers. Certainly one would have thought that *Hutchins* v. *Chambers* (2) decided in

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(1) 6 B. & C. 467. (2) 1 Burr. 579.

1758, would have encouraged landlords to raise it, or text writers to discuss it. Even if we assume that those whose business it is to levy distress for rates have been long of opinion that the Act does not apply, this affords no ground for perpetuating the error. "Communis error facit jus" is a maxim of very limited application; it is truer to say "Communis opinio "is evidence of what the law is"—per Lord Ellenborough C.J. in *Isherwood* v. *Oldknow* (1), but here there is no trace of a communis opinio among lawyers. And if there has been prevalent an erroneous view of the Act, it is clear that no one has acquired rights in consequence; the most that can be said is that landlords have perhaps been induced to refrain from exercising the right given them by the Act in the particular case of distress for rates. Whether it is desirable in modern conditions that the landlord should have a preference over the rating authority is a matter for the Legislature, and not for the Courts. We are bound to decide the case according to what we believe to be the true view of the law.

The result is that the appeal will be allowed with costs, and judgment entered for the plaintiff with costs on the same scale as were allowed by the county court judge at the hearing. The case is one of obvious importance and novelty, and if the defendants so desire, leave to appeal to the House of Lords will be given.

Appeal allowed.

Solicitors for appellant: *Simon, Haynes, Barlas & Ireland, for Feibusch & Wells, Wolverhampton.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for J. Brock Allon, Wolverhampton.*

(1) (1815) 3 M. & S. 382, 396.

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July 17.

HOLT *v.* DAWSON.

Landlord and tenant—Rent restriction—Dwelling-house—Decontrol—Possession by landlord—Handing over key of house—Symbolical delivery of possession—" Actual possession "—Rent and Mortgage Interest Restrictions Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-ss.* 1, 3.

Registration of decontrol—Application for by landlord—Mistake in filling up form—Wrong date—Validity of application—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 2, *sub-ss.* 3–5*—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 26), *s.* 4*—Rent Restrictions Regulations,* 1938, *St. R. & O.,* 1938, *No.* 827, *Form.*

The weekly tenant of a controlled dwelling-house gave notice to terminate her tenancy on March 12, 1928, and on that date she there handed the key of the dwelling-house to the agent of the landlord. Directly afterwards, pursuant to a previous arrangement by the parties, a nephew of the tenant appeared, received the key from the agent, and entered into occupation of the dwelling-house which the landlord then purported to let to him as a decontrolled dwelling-house on a weekly tenancy at a contractual rent thereafter continuously paid.

The dwelling-house being one to which the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, and the Rent Restrictions Regulations, 1938, thereunder were applicable, the landlord made an application, purporting to be an application under these provisions and in the form thereby prescribed, for the registration of the dwelling-house as decontrolled, but in the space in the form of application where the date of the occurrence alleged to have produced decontrol (in this case possession by the landlord) ought to be inserted he put " June 9, 1928 " instead of " March 12, 1928 " ; and the local authority thereupon purported to register the dwelling-house as decontrolled :—

Held, by the Court of Appeal :

(1.) that the retention of the key by the agent of the landlord during the very short period of time which intervened between his receiving it from the outgoing tenant and his handing it to the incoming tenant sufficed to give the landlord " actual possession " of the dwelling-house within the meaning of the Rent and Mortgage Restrictions Act, 1923, s. 2, and, accordingly, that it thereupon became decontrolled and could properly be let at a contractual rent.

Hall v. Rogers (1925) 133 L. T. 44 dictum adopted.

Caledonian Heritable Estates, Ld. v. *Methven,* 1927 S. C. 39 distinguished.

(2.) that the insertion of the wrong date in the application for registration did not prevent the application or the registration from being valid and effective under the Act of 1938 and the Regulations, and that by virtue of the registration the dwelling-house therefore remained decontrolled.

APPEAL from the judgment of His Honour Judge Leigh at Manchester County Court.

The facts were stated by the learned county court judge as follows :—

Prior to March, 1928, Mrs. Donaldson was the tenant of premises at Moss Side, Manchester, at a rental of 14*s.* 2¼*d.* per week. She and her husband decided to leave the house, and suggested to their nephew, Mr. G. F. Dawson, that they might be able to secure the tenancy for him. He asked his aunt to see what she could do. She accordingly saw the agent of Mr. Holt, the landlord, who said he was willing to accept the nephew as tenant, but only upon condition that the house became decontrolled, and that he would want a rent of 15*s.* 6*d.* per week, though he would not insist upon this if the nephew could not afford so much. Mrs. Donaldson gave oral notice to terminate her tenancy on Monday, March 12, 1928, and it was arranged that she and the agent and the nephew should meet together at noon on March 12, for the purpose of handing over the key. The meeting took place between Mrs. Donaldson and the agent, and Mrs. Donaldson handed over the key. Directly afterwards the nephew appeared and received the key from the agent. Mrs. Donaldson and her husband remained on the premises for two days, when they left with the bulk of their furniture, but a small quantity which they had sold to the nephew remained on the premises. Rent was paid by Mrs. Donaldson down to and including March 12, 1928, at the above mentioned rate of 14*s.* 2¼*d.* The nephew (hereinafter called " the tenant ") paid rent on March 19, 1928, in respect of the preceding week at the agreed rate of 15*s.* 6*d.*, and continued to pay at the same rate afterwards.

The dwelling-house, being one to which the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, and the Rent Restrictions Regulations, 1938, were applicable, the landlord made an application, purporting to be an application under the provisions and in the form thereby prescribed, for the registration of the dwelling-house as decontrolled, but in the space in the form of application where the date of the occurrence alleged to have produced decontrol (in this case possession by the landlord) ought to be inserted he put June 9, 1928, instead of March 12, 1928; and on August 26, 1938, the local authority thereupon purported to register the dwelling-house as decontrolled.

On January 25, 1939, the tenant made an application to the county court for the purpose of having it determined whether or not the house was controlled.

The landlord brought an action against the tenant in the county court claiming payment of arrears of the contractual rent, and a declaration that the dwelling-house was decontrolled by his having come into possession of it. The tenant alleged by way of defence that the landlord had never obtained "actual possession" of the dwelling-house under the Rent and Mortgage Interest Restrictions Act, 1923, s. 2, and that, if he had, he had not made an application for registration of the dwelling-house as decontrolled in the form prescribed by the Act of 1938, and the Regulations thereunder, and that the registration was invalid and the house controlled.

The county court judge found in favour of the landlord on both points.

The tenant appealed to the Court of Appeal. The appeal was heard on July 17, 1939.

J. Dill Smith for the tenant, appellant:

The county court judge was wrong in holding that the dwelling-house was decontrolled.

First, the dwelling-house did not become decontrolled in the only way in which it is alleged that it became decontrolled—namely, by the landlord having come into "possession" of it within the meaning of the Rent and Mortgage Interest Restrictions Act, 1923, s. 2. By sub-s. 3 of that section, for the purposes of the section, the expression possession is to be construed as meaning "actual possession." In order that the landlord may come into the actual possession of the

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dwelling-house within the meaning of the section he must be in possession of it by himself or his agent for some substantial time. Where the landlord grants a tenancy to commence immediately on the termination of an existing tenancy and the outgoing tenant possibly hands the key directly to the incoming tenant, the landlord may no doubt be in legal or notional possession of the premises at the instant when the one tenancy ends and the other begins, as otherwise he could not give possession to the incoming tenant, but there is no interval of time between the two tenancies during which he can have actual possession within the meaning of the section: *Caledonian Heritable Estates, Ld.* v. *Methven.* (1) Further, if the interval of time between the two tenancies is very short there may be a change of tenancy with the landlord's consent, but no opportunity for actual possession by the landlord. Here, there is no evidence to show that the landlord ever obtained actual possession of the dwelling-house within the meaning of the section. The outgoing tenant at the termination of her tenancy handed the key to the landlord's agent, but directly afterwards the agent handed it to the incoming tenant so that there was no appreciable interval of time during which the landlord could be said to have had actual possession. The case of *Thomas* v. *Metropolitan Housing Corporation, Ld.* (2), is distinguishable for in that case there was a substantial interval of time between the delivery of the key by the outgoing tenant on the termination of her tenancy to the landlord's agent and the commencement of the new tenancy. A mere agreement between landlord and tenant that premises should be decontrolled will not decontrol them, because the parties cannot contract out of the Rent Acts.

Secondly, even if the dwelling-house was decontrolled by reason of the landlord having come into the actual possession of it, it must now be deemed to be again controlled because it has not been duly registered under the Rent and Mortgage Interest (Restrictions) Act, 1938, s. 4. The provisions of that

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(1) 1927 S. C. 39, and particularly 43 and 46.
(2) [1936] 1 All E. R. 210.

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Act, and of the Rent Restrictions Regulations, 1938, in regard to the application for registration of a dwelling-house and the ensuing registration thereof impose public duties on the parties concerned, and it must therefore be taken to be the intention of the Legislature that they should be mandatory and imperative and not merely directory, and that any non-compliance with them should invalidate the registration: see Maxwell on the Interpretation of Statutes, 8th ed., p. 321 *seq.* Here, the landlord's application for registration of the dwelling-house did not comply with these provisions inasmuch as in column 4 of the application where the date of the occurrence alleged to have produced decontrol (in this case possession by the landlord) should be inserted, the landlord entered an erroneous date. Sect. 2, sub-s. 4, of the earlier Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and s. 4, sub-ss. 3–5, of the Act of 1938, show that in the matter of registration these enactments attach great importance to accuracy in dates. Where a landlord served on a tenant a notice of increase of rent under the Increase of Rent and Mortgage Interest (Restriction) Act, 1920, and also a notice to quit, and the former notice was served with wrong dates, it was held that there was no valid notice to quit: see *Peizer* v. *Federman.* (1)

J. C. Jolly K.C. and *J. L. Elson Rees* for the landlord, respondent, were not called upon to argue.

SCOTT L.J. This is an appeal from the judgment of His Honour Judge Leigh at the Manchester County Court on two questions arising under the Rent Restriction Acts. These questions, like many of the questions arising under these Acts, present aspects which are prima facie puzzling, but, in our view, they are comparatively simple when properly understood. We agree with the conclusions arrived at in regard to them, after careful analysis, in the judgment of the learned judge.

The first question is whether the dwelling-house came into the actual possession of the landlord within the meaning of

(1) [1921] W. N. 320.

s. 2 of the Rent and Mortgage Interest Restrictions Act, 1923, which by sub-s. 1, provides that where the landlord of a dwelling-house to which the principal Act applies comes into possession of the whole of the dwelling-house, then from and after the date when the landlord comes into possession, the principal Act shall cease to apply to the dwelling-house; and by sub-s. 3 that for the purposes of the section the expression "possession" shall be construed as meaning "actual possession," and the landlord "shall not be deemed "to have come into possession by reason only of a change of "tenancy made with his consent."

The facts as stated by the county court judge were as follows: [His Lordship stated the facts relating to the first question as above set out, and continued:] The question is whether or not that transaction gave the landlord the actual possession of the dwelling-house within the meaning of that sub-section. The learned county court judge concluded that the transaction did give the landlord actual possession of the dwelling-house, and held that it was accordingly then decontrolled and became a dwelling-house to which the Rent Acts no longer applied. In my opinion the conclusion of the learned judge was right. My reason for that opinion is that the handing over of the key by Mrs. Donaldson as tenant of the dwelling-house to the agent of the landlord was a symbolic act which at common law prima facie carried with it that of which the key was the symbol, namely the means of access to and therewith the possession of the dwelling-house; and if that symbolic act was done with the intention of conveying that of which the key is the symbol, namely the right of access to the house, then it is impossible to treat it as anything but the handing over of actual possession. Where the tenancy of a house comes to an end either by effluxion of time or by surrender to the landlord and the tenant brings the key and hands it to the landlord or his agent who accepts it, the presumption is that the tenant intends to give and the landlord to take the actual possession of the house. That is what happened here.

It has been argued for the appellant that the mere fact that a very short time after the outgoing tenant had handed the key to the landlord's agent, the appellant came in and received the key from the agent, taking a tenancy on new terms, operated as an immediate transfer of possession of the dwelling-house from the old tenant to the new, and prevented the landlord from obtaining actual possession of it; but however short the time that elapsed, I cannot see that its mere shortness is any evidence to take from the act already accomplished, namely the handing over of the key to the landlord, its character of a handing over to him of "actual possession" within the meaning of s. 2, sub-s. 3, of the Act of 1923. In these circumstances the dwelling-house, in my opinion, became decontrolled.

The question is not free from authority. In the case of *Thomas* v. *Metropolitan Housing Corporation, Ld.* (1), the same question was considered. In that case very shortly before the expiration of her tenancy the outgoing tenant moved out of the premises and handed the key to the landlord's agent and the premises remained unoccupied for one or two days before the commencement of a new tenancy, and the question was raised whether the actual possession of the premises had been handed over to the landlord. In the course of his judgment in that case Slesser L.J. said (2), after quoting *Hall* v. *Rogers* (3): "In the case of *Hall* v. *Rogers* (3) Scrutton "L.J., dealing with this section" [s. 2 of the Act of 1923], "says: 'I think Parliament in using the phrase "actual "'"possession" intended to reject the legal right to possess and "'to require actual control or apparent dominion in fact.'" That expression exactly describes the effect of the apparent possession of the key when that one fact and nothing else is in evidence. There, Slesser L.J. held that the landlord, having been in possession of the key, though only for a short time, had come into actual possession of the premises. With that judgment I agreed; and so did Eve J., with the reservation that he looked forward to the occasion when the Court should have to determine what "actual possession" meant in this Act.

(1) [1936] 1 All E. R. 210.
(2) Ibid. 214.
(3) (1925) 133 L. T. 44.

Counsel for the tenant cited *Caledonian Heritable Estates, Ld.* v. *Methven* (1), where on different facts the Scottish Court of Session, Lord Blackburn dissenting, held that the landlord was not in actual possession of the house. That, however, was a case where the tenant gave notice at Candlemas term, February 2, of his intention to remove at Whitsunday term, May 15, and thereafter the landlord let the house to a new tenant on a tenancy to commence at that Whitsunday term, so that the old tenant removed and the new tenant entered into possession at the same time and there was no intervening time during which the landlord could have been in actual possession.

Each of these cases as to actual possession by the landlord, must be decided on its own particular circumstances, and the fact that in one case a Court or judge has taken a certain view is of little guidance in other cases.

As to the present case, in my view, the fact that the landlord's agent in effect declared to both the old and the new tenants that, as previously arranged, he was taking the key on the terms that the dwelling-house was decontrolled, clothed that symbolic act with the efficacy of a transfer to him of the actual possession of the dwelling-house.

The second question, which is one of relatively subordinate importance, arises under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, by which it is enacted in effect that if the landlord claims that the dwelling-house is decontrolled he shall make an application to the local authority for its registration, and that unless he does so the dwelling-house shall be deemed to be still controlled.

The Act of 1938 provides by s. 4, sub-s. 1, that the application for registration shall be made within three months after the passing of the Act, and the registration shall continue in force for four years. The point taken is that the Acts and the Rent Restrictions Regulations, 1938, made under them provide that the application for registration shall be made in a certain form and inter alia that the form shall contain certain particulars under four respective headings, namely, the address of the dwelling-house, its rateable value, the occurrence which produced decontrol, and the date of that occurrence. Here the occurrence which was alleged to have produced the decontrol of the dwelling-house was and was stated in col. 3 of the form to have been that the dwelling-house came into possession of the landlord. The date of that occurrence was March 12, 1928, but instead of that date the landlord inserted in col. 4 the date June 9, 1928. That fact became known to the tenant when, on looking at the register he found the erroneous date. His lawyer advised him to take the point that because the landlord had not stated correctly in his application for registration one of the particulars required to be inserted therein, namely, the date to be inserted in col. 4 of the form, the application for registration was not in accordance with the Acts and Regulations, and, therefore, the whole registration founded upon it fell to the ground, and the dwelling-house must be deemed to be re-controlled. That view cannot be accepted for the reason that under the Acts the essential matter is the making by the landlord of the application specified in s. 2 of the Act of 1933 and s. 4 of the Act of 1938. [His Lordship read the first mentioned section and continued :] The vital features of that section are a claim by the landlord that the dwelling-house has been decontrolled, and an application accordingly to the local authority for the registration of the dwelling-house. That Section was amended and continued by s. 4 of the Act of 1938 which did not alter its substance and preserved those features of it to which I have referred. There is nothing in the Regulations of 1938 which touches these provisions. I think that a mere error of date in the form of application for registration does not necessarily prevent the application from being an application for registration of the dwelling-house as being decontrolled. To hold otherwise would be to read into these Acts a provision like that in the Bills of Sale Act (1878) Amendment Act, 1882, s. 9, which provides that a bill of sale shall be void unless made in accordance with the form in the Schedule to that Act, meaning that unless the statutory form is followed faithfully there will be a total avoidance of the bill of sale. No such provision is to be found in the Acts and Regulations here in question. There is nothing in them to show that the instructions as to the details to be specified in the form of application are more than directory. In these circumstances I think that this error in the fourth column of application as to the date on which the landlord obtained possession of the premises is not a material error or departure from the requirements of the Acts and does not invalidate the landlord's application for registration.

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(1) 1927 S. C. 39.

I, therefore, think that this dwelling-house is a decontrolled dwelling-house, and that the new tenancy of it entered into on March 12, 1928, was a decontrolled tenancy in respect to which the increase of rent was valid.

CLAUSON L.J. I agree.

DU PARCQ L.J. I agree.

Appeal dismissed.

Solicitor for appellant : *V. Morley Lawson, for Albert Aboudi, Manchester.*

Solicitors for respondent : *Martin & Co., Manchester.*

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19.

PERKINS *v.* HUGH STEVENSON AND SONS, LIMITED.

[1938. P. 696.]

Master and Servant—Workmen's Compensation—Injury to workman—Claim for and receipt of compensation—Ignorance of right to elect remedy under the Workmen's Compensation Act and remedy independently of it—Loss of right to recover damages at common law—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 29, *sub-s.* 1.

In September, 1937, the plaintiff was injured by an accident arising out of and in the course of his employment by the defendants and applied for and was paid weekly sums by way of compensation under the Workmen's Compensation Act, 1925. Subsequently the plaintiff obtained the assistance of a solicitor who on November 10, 1937, wrote to the defendants claiming that the weekly payments received and to be received by the plaintiff had been and would be received by the plaintiff without prejudice to any remedy outside the Act. This view was not accepted by the defendants. The plaintiff continued to receive weekly payments until October, 1938, and to give unqualified receipts for them, but he brought this action on March 21, 1938, claiming damages for negligence and for breach of statutory duty and alternatively for damages under the Employers' Liability Act:—

Held (affirming Hilbery J. on the first point) (1.) that as the plaintiff had claimed and been paid compensation under the Workmen's Compensation Act, 1925, his employers could not also be made liable for damages independently of the Act in view of the direct provision to the contrary in s. 29, sub-s. 1, of the Act; and (2.) that the plaintiff by continuing to receive compensation and to give unconditional receipts after the date of the letter of November 10, 1937, when he must have become aware of his right to elect under that sub-section between his remedy under the Act and his remedy independently of it, must be taken to have exercised the option conferred by the sub-section by electing to take compensation under the Act.

APPEAL from Hilbery J.

The plaintiff was employed by the defendants at their factory at 8, Brook Road, Garrett Lane, Earlsfield, and on September 17, 1937, he was told to stop a boiler by removing a revolving bolt from one pulley to another. In trying to do so he met with an accident and was severely injured. He applied to the employers for compensation under the Workmen's Compensation Act, at first without success, but on the fourth occasion on October 14, 1937, the employers paid him compensation for four weeks at the rate of 1*l.* 10*s.* a week, and thereafter continued to pay him weekly compensation at this rate. On October 14, 1937, the workman signed, by affixing his mark before a witness, a form of receipt for compensation "in respect of injuries by accident received "by me on the 17th day of September, 1937, for which injuries "I hereby claim and elect to be compensated in accordance "with the Workmen's Compensation Act, 1925." Receipts for subsequent payments were signed on the back of this form.

While these payments were being made the plaintiff consulted solicitors, who on November 10, 1937, wrote to the employers stating that they had been asked to advise the plaintiff in respect of the accident, and continuing: "We "understand that certain payments have been made to Mr. "Perkins and we write to inform you that his acceptance of "such payments was without prejudice to his rights at Common "Law and under the Employers' Liability Act and that if "any further payments are made, they will be accepted "subject to the same qualification." The defendants' insurance company replied on November 19, 1937, on their behalf pointing out that the plaintiff had already made his election and had in fact claimed and received compensation under the Workmen's Compensation Act. The letter continued: "This being so, his claim for damages at Common "Law is barred." The solicitors in their reply on November 22, 1937, denied this.

Thereafter the workman continued to receive from the employers and to give unqualified receipts for weekly payments of compensation down to October, 1938, but in the meanwhile the plaintiff issued the writ in this action on March 21, 1938, claiming damages for negligence and for breach of statutory duty, alternatively, compensation under the Employers Liability Act, 1880, and alternatively, compensation under the Workmen's Compensation Act, 1925.

Hilbery J. said that a prima facie case was made by the plaintiff on the evidence, but that two answers were made by the defendants to the plaintiff's common law claim. The first was that although they had been guilty of a breach

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of their statutory duty to fence a piece of dangerous machinery, yet the plaintiff was guilty of contributory negligence. The second plea being that before the action was commenced the plaintiff claimed and received compensation under the Workman's Compensation Act, 1925, and that the defendants were, in view of s. 29 of the Act (1), under no liability in damages at common law.

The plea of contributory negligence was not made out. As regards the other plea, the fact was that already earlier in 1937 the plaintiff had met with an accident arising out of and in the course of his employment and had received *7l.* 1*s.* 8*d.* as workmen's compensation in respect of the period whilst he was away from work owing to the accident and knew that it was compensation under the Act. After this accident the plaintiff had applied for and received compensation, but he (his Lordship) did not suppose that the plaintiff knew he had any common law remedy open to him, although he had signed a form of receipt in which he claimed and elected to be compensated under the Act of 1925. It was obvious that the plaintiff in seeking compensation did not know and had not present to his mind the existence of any alternative remedy or of any right to select his remedy. In these circumstances it would be a misuse of language to say that he had elected.

There remained one other way of treating this matter. The plaintiff claimed and was paid workmen's compensation and on the authority of Atkin J.'s judgment in *Codling* v. *John Mowlem & Co., Ld.* (2), the employers were by the terms of s. 29 of the Act of 1925, relieved of liability to pay under the

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(1) Workmen's Compensation Act, 1925, s. 29, sub-s. 1: "When "the injury was caused by the "personal negligence or wilful "act of the employer or of some "person for whose act or default "the employer is responsible, "nothing in this Act shall affect "any civil liability of the "employer, but in that case the "workman may, at his option, "either claim compensation under "this Act or take proceedings "independently of this Act; but "the employer shall not be liable "to pay compensation for injury "to a workman by accident "arising out of and in the course "of the employment both in"dependently of and also under "this Act, and shall not be liable "to any proceedings independent"ly of this Act, except in case of "such personal negligence or "wilful act as aforesaid."

(2) [1914] 2 K. B. 61, 66.

Act and independently of it. The plaintiff was therefore debarred from succeeding in this action.

The plaintiff appealed. The appeal was heard on July 17, 18, 19, 1939.

Neville Laski K.C. and *D. M. Wilson* for the appellant. Hilbery J. was right in saying that the option under s. 29, sub-s. 1, of the Compensation Act, 1925, had not been exercised. It could not be exercised without knowledge of the alternative remedies and that knowledge was found to have been absent when the application for compensation was made. But he was wrong in holding that the plaintiff by applying for and receiving compensation had barred himself from recovering damages against the employers for the same injury under the second part of s. 29, sub-s. 1. He relied on *Codling* v. *John Mowlem & Co., Ld.* (1), but in the Court of Appeal, Buckley L.J. disagreed with the view that it was immaterial that payment of compensation was received by a workman without knowledge of his other remedy. See also *Kinneil Cannel and Coking Coal Co.* v. *Sneddon or Waddell* (2), and *Selwood* v. *Towneley Coal and Fireclay Co., Ld.* (3)

[MacKinnon L.J. *Selwood's* case (3) is very different from this case, for there the workman was in hospital and the employers' representative went and paid him money when he had no means of applying his mind to the position.]

It is true that the appellant went and asked for compensation, but he did it without knowing that he had any other remedy available. The mere acceptance of payments of compensation does not suffice to exclude the remedy at common law: *Burke* v. *Elder Dempster Lines, Ld.* (4) [They referred to *Munday* v. *Thames Ironworks Co., Ld.* (5); *Kendall* v. *Hamilton* (6); and *Scarf* v. *Jardine.* (7)] Here s. 29, sub-s. 1, of the Act conferred an option on the plaintiff and a knowledge of his legal rights was necessary to the exercise of the option:

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(1) [1914] 2 K. B. 61, 66, 67; [1914] 3 K. B. 1055.

(2) [1931] A. C. 575.

(3) [1939] 2 All E. R. 132; 32 B. W. C. C. 37.

(4) [1939] 3 All E. R. 339.

(5) (1882) 10 Q. B. D. 59.

(6) (1879) 4 App. Cas. 504.

(7) (1882) 7 App. Cas. 345.

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see *Pusey* v. *Desbouvrie.* (1) It is not as if proceedings had been brought for compensation and an award made.

C. L. Henderson for the respondents. This appeal must fail because the workman has asked for and obtained compensation under the Act of 1925, and he cannot also obtain damages independently of the Act, having regard to the express words of s. 29, sub-s. 1, of the Act. The workman had originally an option to receive compensation under the Act or to recover damages independently of it, but as soon as he had asked for and received compensation the option ceased to exist. It is immaterial that he did not knowingly exercise an option because he has received payment under the Act and the sub-section expressly excludes him from also obtaining damages at common law. This matter is independent of any question of election which is exhaustively dealt with in *Bennett* v. *L. and W. Whitehead, Ld.* (2): see also *Evans* v. *Bartlam.* (3) The claim for and the receipt of compensation together constituted an abandonment of any other remedy. *Kelly* v. *North British Ry. Co.* (4), is distinguishable, for in that case payment was made unequivocally on the footing that the claim for damages remained open and that the sums received were to be refunded if the claim for damages succeeded. Apart from such a contractual arrangement there is no ground on which the sums paid by way of compensation could be recovered so that if the workman were to succeed in this appeal the employers would have paid him under and independently of the Act, which is directly contrary to s. 29, sub-s. 1. *Selwoods'* case (5) is distinguishable because here the workman claimed and knew he was receiving compensation. The solicitor's letter of November 10, 1937, does not help the workman. There was no agreement that the payment and receipt of compensation should be without prejudice to his remedy at common law. But it does show that from then on the workman knew of his alternative remedies and yet he went on receiving compensation

(1) (1734) 3 P. Wms. 315.
(2) [1926] 2 K. B. 380.
(3) [1937] A. C. 473, 479.
(4) 1916 S. C. 19.
(5) [1939] 2 All E. R. 132.

and giving unqualified receipts. This alone is fatal to his present claim.

Burke v. *Elder Dempster Lines, Ld.* (1) was wrongly decided.

[He also referred to *Little* v. *P. and W. MacLellan, Ld.* (2) and *M'Ginty* v. *Kyle.* (3)]

Neville Laski K.C. replied.

SIR WILFRID GREENE M.R. In my opinion, the learned judge came to a correct decision in the action out of which this appeal arises.

The appellant was a workman who, on September 17, 1937, suffered an accident while in the employment of the respondents. He applied for, and was paid as such, weekly sums by way of compensation under the Workmen's Compensation Act. Those payments continued until October, 1938, at which date it appears, at any rate, highly probable, on the evidence, that his right to compensation had come to an end owing to his recovery from the accident.

While those payments were being made and received he issued the writ in the present action, on March 21, 1938, claiming damages for negligence, damages for breach of statutory duty; alternatively, compensation under the Employers' Liability Act; alternatively, compensation under the Workmen's Compensation Act. That last claim was no doubt put in with the object of obtaining, if he failed in his proceedings outside the Workmen's Compensation Act, the assessment of compensation under that Act, the right to which is given to the workman who is unsuccessful in proceedings at common law or otherwise than under the Act, by s. 29, sub-s. 2, of the Workmen's Compensation Act, 1925.

The first payments which were made by the employers in pursuance of the claim of the appellant were not in any way qualified, nor was the receipt of them in any way qualified.

I should mention here, in parenthesis, that a claim under the Act for compensation can be quite informal and, in the present case, there is, in my judgment, no doubt that the claim was made under the Act and that the payments were made in pursuance of that claim.

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(1) [1939] 3 All E. R. 339.
(2) (1900) 2 F. 387.
(3) 1911 S. C. 589.

After, I think, eight payments had been made, the appellant obtained the assistance of solicitors who, on November 10, 1937, wrote to the respondents, referring to the accident, and adding the following paragraph: "We understand that "certain payments have been made to Mr. Perkins and we "write to inform you that his acceptance of such payments "was without prejudice to his rights at common law and under "the Employers' Liability Act and that if any further payments are made, they will be accepted subject to the same "qualification."

The reference in the letter to the earlier payments was, of course, a valiant attempt on the part of the solicitors to preserve their client from any prejudice that the receipt of the earlier payments might have caused him. That letter was answered on November 19, 1937, by an insurance company acting on behalf of the respondents. The letter contained this paragraph: "We must point out that your "client has already made his election, and has in fact claimed "and received compensation under the Workmen's Compensation Act. This being so, his claim for damages at "Common Law is barred."

On November 22, the appellant's solicitors answered that letter and stated: "We deny that our Client has made any "election in this matter or that he has claimed and received "compensation under the Workmen's Compensation Act. "In any case, however, it is a matter for the Court and you will "be hearing further from us in due course."

The payments, as I have said, continued long after that letter of November 10 was written, and on each occasion when a payment was made the receipt was a clean receipt and no terms were imposed, much less agreed to, in respect of any of those payments.

The learned judge, upon the facts, held that at the time when the workman made his claim for compensation and received the first payment he did not know that he had a right under s. 29, sub-s. 1, of the Act to elect as between two

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alternative remedies, and on that basis he held, in conformity with a decision of Atkin J., as he then was, in *Codling* v. *John Mowlem & Co., Ld.* (1), a decision on this point which was approved in this Court in the case of *Bennett* v. *L. and W. Whitehead, Ld.* (2), that the workman, not knowing of the existence of his right to elect. could not be said to have exercised the option given to him by the sub-section. I do not propose to examine that part of the judgment, in so far as it rests upon a finding of fact, as to the workman's knowledge at the time. The evidence about that is not complete, but I will assume, for the purposes of this judgment, that the workman did not know at that time that he had that statutory right. The effect of his subsequently becoming aware of that statutory right, as he clearly did by November 10, coupled with the subsequent payments, I shall deal with later in this judgment. For the moment, the matter with which I propose to deal is not concerned with the effect of that letter, but is upon the basis that the payments were made under the Workmen's Compensation Act and obtained under that Act, without complicating the matter by any question of receipt without prejudice.

Sect. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, and the similar section in the earlier legislation have given rise to a number of problems and a not inconsiderable difference of judicial opinion on certain points. Many cases have been decided upon the language of the sub-section; but, fortunately, upon the facts of the present case, I do not find it necessary to refer in any detail to any of them.

The sub-section is in the following language: "When "the injury was caused by the personal negligence or wilful "act of the employer or of some person for whose act or default "the employer is responsible nothing in this Act shall affect "any civil liability of the employer, but in that case the work-"man may, at his option, either claim compensation under "this Act or take proceedings independently of this Act; "but the employer shall not be liable to pay compensation

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(1) [1914] 2 K. B. 61; and in C. A. [1914] 3 K. B. 1055.

(2) [1926] 2 K. B. 380.

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"for injury to a workman by accident arising out of "and in the course of the employment both independently of and also under this Act, and shall not be liable to "any proceedings independently of this Act, except in case "of such personal negligence or wilful act as aforesaid."

The case that we have here is not a case where the workman has claimed compensation and, without receiving payment under that claim, has subsequently abandoned his claim and brought proceedings at common law; nor are we concerned with a case where a contested claim has gone part of the way to arbitration and has then been dropped. Questions which arise upon cases of that kind are not questions with which we are concerned, because we have here the fact that the workman has received compensation pursuant to a claim made under the Act.

It must, I think, be accepted that the mere making of a claim without knowledge of the existence of the right of choice which the statute gives will not amount to an exercise of the option in circumstances where the workman did not know of the existence of his right of choice. It would also appear that the mere making of such a claim, even if he had the knowledge, would not bar him from abandoning it and afterwards proceeding at common law. That appears to be the effect of the decision of this Court in the case of *Bennett* v. *L. and W. Whitehead, Ld.* (1) What is to happen where the workman, having at the time of making his claim and receiving the money ex hypothesi no knowledge of his right of option, nevertheless receives and puts into his pocket money paid in pursuance of that claim and in liquidation of the employer's statutory liability under the Act? In answering that question, it is important to consider the language of what I may call the second limb of the sub-section. As I view that second limb, at any rate, for the purposes of the present case, there is no necessity to decide whether or not it operates as a qualification on the option given by the first part of the subsection, or whether it is rather an independent provision. The result, for the present purposes, would be the same, and the decision of any such fine point would, for present purposes, be academic.

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(1) [1926] 2 K. B. 380.

The effect of the second limb of the section is to exempt the employer from liability to pay compensation, both under the Act and outside the Act. Whether or not that is limited to cases of payment to the same person is a matter which has been much debated, and eventually, I think, set to rest by the decision of the House of Lords in the case of *Kinneil Cannel and Coking Coal Co., Ld.* v. *Sneddon or Waddell.* (1) The words, in my opinion, do exempt an employer from liability to pay to the same person and in respect of the same accident compensation both under the Act and outside the Act.

The words "shall not be liable to pay compensation for "injury," require a word or two of comment. They cannot, I think, be interpreted as meaning that no liability shall exist. What happens when an accident takes place, if it be one giving a right to compensation under the Act and also a right of action at common law is, I apprehend, that from that moment the employer is under two liabilities. Which one will ultimately be made effective against him is, at that moment, uncertain. He is not to have both liabilities made effective against him. But, at the outset, both liabilities are there, and it is for the workman, by the appropriate action, to enforce the one or the other. I therefore regard these words as referring to the enforcement of the liability, and, to put it in quite popular language, the employer is not to be made to pay twice over to the same person. I add those words, "to the same person," because I do not wish it to be thought that I am saying anything which is inconsistent with what was said in the House of Lords in *Kinneil's* case. (1) The liability of the employer to pay compensation under the Act, which arises when the accident takes place, is one which, of course, like all liabilities can be enforced in one of two ways— I should not, perhaps, say "enforced," but can be made effective. It can be made effective by satisfaction of the liability out of Court: it can be made effective by the obtaining by the workman of an award which entitles him to payment

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(1) [1931] A. C. 575.

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from his employers. But whichever method is in fact adopted in any particular case, the result is necessarily the same, in the sense that by the payment in the one case and by the making of the award in the other case the liability of the employer, under the Act, is discharged; and where the employer, in response to a claim under the Act, has made a payment of compensation under the Act, that payment discharges once and for ever, in whole or pro tanto, the statutory liability under the Act. It seems to me impossible to say in a case where, in response to a claim for compensation under the Act, the employer, in satisfaction of that claim, has made the statutory payment, that he has not been made liable to pay compensation under the Act. He has been made liable to pay just as much by acceding to the claim, without litigation, as he would have been made liable to pay if he had resisted the claim and had it enforced against him as the result of that litigation.

The matter can be looked at in another way. Suppose the employer, having had workmen's compensation claimed against him, satisfied that claim up to the hilt, and when he has done so the workman begins an action at common law and says, " At the time when I made that claim and received "those payments I knew nothing about my option under the "sub-section, and, therefore, it cannot be said that I exercised "that option at all. The first part of the sub-section, therefore, "does not affect me." What would be the position with regard to the second part of the sub-section? Suppose that in the action the workman were to be held entitled to recover damages at common law, what would be the result of the whole matter? The result of the whole matter, truly stated, would be that the employer had, in respect of his liability under the Workmen's Compensation Act, paid compensation under that Act, and, in respect of his liability at common law, had paid damages for negligence at common law. It seems to me that the second limb of the sub-section in terms makes it impossible for such a situation ever to arise. If, in respect of that situation, the result is truly described in the way that I have described it, then a breach of that limb of the sub-section must have taken place.

The argument is reinforced, if it be necessary, by the circumstance that where the workman has received compensation under the Act and subsequently brings proceedings at common law, there is no machinery by which the money he has received as compensation can be set off against or deducted from the damages to be awarded to him at common law. The Act is silent upon that matter : there is no provision dealing with that matter as there is for dealing with costs in the other case where he brings his claim at common law and fails, and then claims under the Workmen's Compensation Act, under s. 29, sub-s. 2. There is no provision of that character dealing with the case of a workman receiving payments under the Act, in circumstances when he could not elect because he did not know, and then afterwards recovering damages at common law. There is no principle of law known to me under which, in those circumstances, it would be possible to deduct or set off what he had been paid as compensation under the Workmen's Compensation Act. The result would accordingly be that, as the result of the whole transaction, the employer would have discharged two liabilities : (1.) a liability under the Act, and (2.), a liability at common law, and that is the very thing against which the sub-section protects him.

Now the decision of the point with which I have just dealt is not, in my view, assisted in any way by the authorities to which we have been referred. It is one that I myself find easy of solution once the language of the sub-section is sufficiently appreciated in its relation to these particular facts.

I have, so far, dealt with the case without reference to the circumstances that, by November 10, 1937, the workman was aware of his right of option. From that moment onwards, but for the point which I will mention presently, it could not have been suggested that he was doing otherwise than exercising his option and electing between two mutually exclusive remedies, and he would, on that basis, have exercised it effectively with no locus poenitentiæ, because his claim had been complied with and satisfied. It seems to me that any locus poenitentiæ that he might have had after making the claim and before it was satisfied would not exist after payment had been made, any more than it would have existed after an award had been obtained. But it is said that that result does not follow by reason of the circumstance that in the solicitors' letter of November 10, it was said that all future payments would be accepted without prejudice. Mr. Laski thereupon conceded, and I think he was bound to concede, that unless there could be inferred from the correspondence and the conduct of the parties an agreement with the employer, the mere insertion of the words "without prejudice" in the letter cannot alter the character of the payments which were made and received. That is a proposition which, I think, could not be disputed. The question, therefore, is whether or not it is possible to infer from that correspondence and the conduct of the parties an agreement between the workman and his employer, to the effect that any moneys paid by weekly payments thereafter should not be finally treated as payments under the Workmen's Compensation Act, but should be held, so to speak, to abide the event, with the result that they would be set off against or deducted from any damages which the workmen might ultimately recover. If it had been an agreement of that sort, the situation would, I think, have been different, and the case would have fallen within the sort of principle which was dealt with in a Scottish case, to which I need not refer at length: *Kelly* v. *North British Ry. Co.* (1)

I find myself quite unable, in the present case, to infer any agreement at all between these parties. In fact, the correspondence and the acts of the parties appear to me to show that, so far from being in agreement, they were completely at arm's length. The employer continued to pay pursuant to the claim which had been made upon him and pursuant to his statutory liability. He declined to agree to those payments being made without prejudice or to abide

(1) 1916 S. C. 19.

the event. That he refused to do. He tendered the money and a clean receipt was given. In those circumstances, the position merely was that the workman, under the cover of the letter was, in effect, saying, "I am still claiming "workmen's compensation, but I propose to treat the money "received under the Act as received without prejudice," and the employer was agreeing to no such thing, but merely making payments pursuant to the claim under his statutory liability. The insistence by the recipient that the receipts were without prejudice appears to me to be of no avail at all.

I think I have dealt with all the points with which it is necessary to deal for the decision of this case, and, in my opinion, as I said at the outset, the decision of the learned judge was perfectly correct and must be affirmed, with the result that the appeal must be dismissed.

MACKINNON L.J. I agree. I observe that Scrutton L.J., in one of the many cases (1) which were cited to us, said, with regard to the equivalent of this s. 29: "there has been an "embarrassing difference of opinion between the judges of "the English, Scotch and Irish Courts, both between nations, "and individual judges of the same nation. It is to be hoped "that the House of Lords may in some case have the "opportunity of giving a final construction of the section."

Fortunately, I think in this present case none of the nice questions which were debated in that case arise.

When the action came on for trial in February, 1939, the plaintiff had received weekly payments of 30*s.* a week for the whole period during which he had been disabled by the accident, those weekly payments amounting in all to 81*l.* He had given a receipt for each payment expressed to be "Compensation .... "in respect of injuries by accident .... for which injuries "I hereby claim and elect to be compensated, in accordance "with the Workmen's Compensation Act, 1925." It is true that in the course of those payments being made his solicitors had written a letter stating that he had previously accepted,

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(1) *Bennett* v. *L. & W. Whitehead, Ld.* [1926] 2 K. B. 380, 396.

MacKinnon L.J.

and would in future accept, such weekly payments without prejudice to his right at common law, but the insurance company refused to agree to any such suggestion and, in face of their refusal, the plaintiff continued to accept the weekly payments and to sign the receipts for them in the form I have quoted.

If the present action had been allowed to proceed and succeed and the plaintiff had been awarded damages at common law, I can think of no legal ground on which the defendants could claim to deduct from the amount of those damages the 81*l.* they had paid to him by those weekly payments. If, as in *Oliver* v. *Nautilus Steam Shipping Co.* (1), or in the Scottish case of *Kelly* v. *North British Ry. Co.* (2), the weekly payments had by agreement between the plaintiff and the defendants been made subject to a condition, the defendants might have claimed credit for the 81*l.* by virtue of such agreement; apart from any such agreement there would be, as I say, no ground on which the defendants could claim credit for the 81*l.* against the damages awarded at common law. If that be so, quite clearly the result of allowing this action to proceed and succeed would be to bring about a breach of the words towards the end of s. 29, sub-s. 1: "but the "employer shall not be liable to pay compensation for injury "to a workman by accident arising out of and in the course "of the employment both independently of and also under "this Act."

That being so, I think it is clear that these considerations are sufficient to dispose of this case and to show that it was rightly decided by Hilbery J.

FINLAY L.J. I agree, and I will add very few words. I assent to everything which the Master of the Rolls has said. For myself, I think that this particular case can be decided upon the ground upon which indeed the learned judge below decided it, that is, on what has been called the second limb of s. 29. That says that "the employer shall not be liable "to pay compensation for injury to a workman by accident

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(1) [1903] 2 K. B. 639.

(2) 1916 S. C. 19.

"arising out of and in the course of the employment both "independently of and also under this Act."

Now I find difficulty in seeing how it can possibly be said that the employer can be said to be not liable to pay compensation under the Act. He was liable to pay and he paid, and, indeed, paid the whole amount which the workman, under the Act, could have obtained. It seems to me that it cannot matter in the least whether he paid pursuant to an Order of the Court made in an arbitration, or whether he paid because, being clearly liable, he agreed to pay without troubling to go to the Court. It is a case to which the words in this limb of the sub-section appear to me precisely to apply, and I agree with what MacKinnon L.J. has just said.

If an action brought independently of the Act were to succeed, that would happen which the Legislature expressly says is not to happen—namely, that the employer would then be held liable independently of the Act, having already become liable under the Act.

I think the absence of any provision for any deduction by way of set-off, or anything of that sort, from the amount recoverable at common law or under the Employers' Liability Act in respect of the amount paid under the Workmen's Compensation Act, is strong to show that the view, which seems to me to be quite obvious, is correct. When the Legislature made no provision for any deduction or any taking into account of the payment under the Workmen's Compensation Act, I think it meant to say, and perfectly expressly said, that if there is a liability to make payment under the Compensation Act, then there shall be no liability independently of the Act.

For these reasons I entirely agree that the judgment of the learned judge in this case was quite right.

Appeal dismissed.

Solicitors: *Murray Napier & Co.; W. Stanley Eastburn.*

H. C. G.

C. A.

1939

July 15;
Oct. 12.

MADELEINE VIONNET ET CIE *v.* WILLS.

Sale of goods—Debt due in foreign currency—Action in England to recover—Rate of exchange—Date for conversion into English currency.

In an action in England to recover the price of goods sold in France and payable in French currency, the correct date on which that debt ought to be converted into English money for the purpose of ascertaining the amount which the plaintiffs ought to recover, is the date when the debt became due in France.

In re British American Continental Bank, Ld., Credit General Liegeois' Claim [1922] 2 Ch. 589 approved and followed.

APPEAL from His Honour Judge Dumas, sitting at the Westminster County Court.

The following statement of facts is taken from the judgment of Clauson L.J.

In September, 1936, the defendant became liable to pay the plaintiffs, a French firm carrying on business in Paris, the sum of 8100 francs for clothes supplied to the defendant in Paris. At the time that the debt has, by agreement of the parties, been treated as becoming due, namely September 24, 1936, the rate of exchange between Paris and London was such that the equivalent of 8100 francs in British currency was 105*l.* 6*s.* 4*d.* The defendant failed to pay, notwithstanding repeated demands. The plaintiffs on December 1, 1938, sued the defendant in the High Court. On December 19, 1938, the defendant paid into Court 65*l.* 6*s.* 5*d.* which was supposed to be the equivalent of 8100 francs at the rate of exchange ruling at the date of the writ. In fact owing to a miscalculation this sum was somewhat greater than the exchange value of 8100 francs as well at the date of the writ as at the date of the payment into Court and at the date (January 31, 1939) when the Master ordered payment out of that sum to the plaintiffs. When payment out of the 65*l.* 6*s.* 5*d.* to the plaintiffs was ordered it appeared that the plaintiffs insisted that they were entitled to the larger sum of 105*l.* 6*s.* 4*d.*, and the action was accordingly remitted to the county court judge to deal with this contention. The action was tried in the

Westminster County Court on March 23, 1939. The county court judge took the view that the 65*l.* 6*s.* 5*d.*, which was treated as the sum which at the date of payment out was sufficient, and indeed more than sufficient, to purchase at the time 8100 francs, satisfied the debt and that no more was due to the plaintiffs, and accordingly gave judgment for the defendant with costs. From this decision the plaintiffs appealed.

Wynn Parry K.C. and *P. R. Hollins* for the appellants. In an action for the recovery of a debt due in a foreign currency, the correct date for converting the sum payable into English currency is the date when the debt became due and not the date of judgment.

The rule is stated in Dicey's Conflict of Laws, 5th ed., p. 728, r. 181, as follows: "When a debtor, or upon the "breach of a contract, a person in default, becomes liable "for the payment of a sum of money in a foreign currency, "the debt or damages for the purpose of an English judgment "must be assessed at the date of the debt becoming due or "the default, and the sum payable must be converted into "English currency at the rate of exchange current at that "date."

The rule has been settled beyond dispute that in assessing damages for breach of contract, the damages must be converted into English currency at the rate of exchange prevailing at the date of the breach: see *Di Ferdinando* v. *Simon, Smits & Co.* (1), which was approved and followed by the House of Lords in *S.S. Celia* v. *S.S. Volturno.* (2) In *Scott* v. *Bevan* (3) the rule was laid down that in an action upon a foreign judgment, where the judgment was expressed in a foreign currency, the date for the conversion of that foreign currency into sterling was the date of the foreign judgment. Lord Eldon L.C. said in *Cash* v. *Kennion* (4): "I cannot bring "myself to doubt, that, where a man agrees to pay 100*l.* in "London upon the 1st of January, he ought to have that sum "there upon that day. If he fails in that contract, wherever

(1) [1920] 3 K. B. 409.
(2) [1921] 2 A. C. 544.
(3) (1831) 2 B. & Ad. 78.
(4) (1805) 11 Ves. 314, 316.

"the creditor sues him, the law of that country ought to give "him just as much as he would have had, if the contract had "been performed." Vaughan Williams L.J. in *Manners* v. *Pearson & Son* (1) said: "It seems clear that, in an action "in whatever form in the English courts for the recovery of "a debt payable in foreign currency, the amount of the "English judgment or order must be expressed in English "currency, and that, unless the relative values of the "respective currencies are fixed by statute or some authority "binding the English courts or by the agreement of the "litigants, the amount of the English judgment or order "must be based on the quantity of English sterling which one "would have to pay here to obtain in the market the amount "of the debt payable in foreign currency delivered at the "appointed place of payment, i.e., the amount payable "according to the rate of exchange . . . . It seems plain "that this mode of computing the value of foreign currency in "English sterling, and thus converting the one currency into "the other, is based upon damages for the breach of contract "to deliver the commodity bargained for at the appointed "time and place, and, if this is so, it follows that the date as "of which that value must be ascertained is the date of the "breach, and not the date of the judgment." That statement has been much relied upon in subsequent cases. A debt stands upon the same footing as damages as regards the date of conversion. The date of conversion of a debt expressed to be payable in a foreign currency into English currency is the date when the debt became due. It has never been suggested that damages for breach of contract should be converted from a foreign currency into English currency at any other date than that of the act complained of. The date taken for conversion is the date when the obligation became payable whether it was in contract or tort. Vaughan Williams L.J. pointed out in *Manners* v. *Pearson & Son* (1) that the element of damage in an action of debt was an essential element, and that therefore the date of the breach was the correct date to take for conversion of the debt into English currency.

(1) [1898] 1 Ch. 581, 592.

[CLAUSON L.J. referred to *Deutsche Bank* v. *Humphrey* (1) where the majority of the Supreme Court of the United States decided that in an action brought in the United States on a debt arising in Germany and payable there on demand in marks it was erroneous to translate the amount due into dollars at the rate of exchange when demand was made, the mark having depreciated thereafter.]

P. O. Lawrence J. held in *Credit General Liegeois' Claim* (2) that a debt due to the claimants in Belgium in Belgian currency ought to be converted into English money at the date when the debt became due in Belgium. That decision is a distinct authority in the appellants' favour. In *Uellendahl* v. *Pankhurst Wright & Co.* (3) Rowlatt J. held, in an action for the price of goods sold and delivered, which was payable in a foreign currency, that the rate of exchange to be taken was that prevailing at the date when the debt became due and not that prevailing at the date of the judgment. In *Peyrae* v. *Wilkinson* (4) Bailhache J. followed that decision. In *Lebeaupin* v. *Richard Crispin & Co.* (5) McCardie J. gave reasons for holding that the damages for breach of contract were payable in London at the rate of exchange ruling upon the date of the breach of contract, and not at the date ruling at the date of the award. Those reasons apply equally in an action for debt. In *Cohn* v. *Boulken* (6) Acton J. held, in an action upon a cheque, that the rate of exchange at which the amount of the judgment was to be calculated was that ruling at the date of trial. But he had been misled by counsel as to what was decided in *Scott* v. *Bevan.* (7) In *Kirsch (J. A.) & Co.* v. *Allen, Harding & Co., Ld.* (8), Roche J. held in an action for breach of contract that damages ought to be assessed at such a sum in sterling as would give the plaintiffs the proper compensation in dollars at the rate of exchange prevailing at the date of the judgment. That decision is contrary to the later decision of Roche J. in *Di*

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(1) (1926) 272 U. S. Rep. 517.

(2) [1922] 2 Ch. 589.

(3) (1923) 39 Times L. R. 628; [1923] W. N. 224.

(4) [1924] 2 K. B. 166.

(5) [1920] 2 K. B. 714.

(6) (1920) 36 Times L. R. 767.

(7) 2 B. & Ad. 78.

(8) [1919] W. N. 301; 89 L. J. (K. B.) 265.

Ferdinando v. *Simon, Smits & Co., Ld.* (1), and also to the decision of the House of Lords in *S.S. Celia* v. *S.S. Volturno.* (2) The decision of the Court of Appeal in *Société des Hôtels le Touquet Paris-Plage* v. *Cummings* (3) is not directly in point; the question there being whether a tender of francs in France was binding in England. The observations of Atkin L.J. in that case on the question of damages were obiter.

Gordon Thompson for the respondent. The decision of the county court judge was correct. The authorities cited have dealt principally with actions for breach of contract and none of them are quite the same as the present case. This action was for the price of goods supplied by a French firm and payable in French currency. The only difference between the present case and *Société des Hôtels le Touquet Paris-Plage* v. *Cummings* (3) is that in that case the debt was paid in France in francs, whereas in the present case the debt was not paid in France but was paid into Court. The plaintiffs have always demanded payment of 8100 francs and they must be satisfied with payment of that amount of francs. The date of payment in is the correct date for converting the 8100 francs into English currency. The plaintiffs will then be receiving a sum, which converted into francs, will give them 8100 francs and they will not lose anything, but if the date when the payment became due is taken as the correct date for the conversion the plaintiffs will receive a sum which when converted into francs will give them very much more than 8100 francs. If that date is taken as the correct date for conversion of the francs into English money the creditor may get more or less than the amount claimed in francs. This case is governed by the decision of the Court of Appeal in the *Le Touquet* case. (3)

Wynn Parry K.C. replied.

Cur. adv. vult.

1939. Oct. 12. CLAUSON L.J. read the following judgment as the judgment of the Court (SCOTT, CLAUSON and DU PARCQ L.JJ.)

(1) [1920] 2 K. B. 704.
(2) [1921] 2 A. C. 544.
(3) [1922] 1 K. B. 451.

This is an appeal from a decision of His Honour Judge Dumas sitting at the Westminster County Court entering judgment for the defendant in a remitted action. [His Lordship then stated the facts set out above, and continued :]

There was no dispute but that the contract which gave rise to the defendant's obligation was one to which the law of France applied, and that under it the defendant became bound to pay the plaintiffs 8100 francs in Paris on September 24, 1936. It was contended for the defendant that if, before judgment in the action, the defendant had paid 8100 francs to the plaintiffs in French currency that would have put an end to the plaintiffs' claim for the debt. It is clear that at all events in this Court that contention must be treated as correct in view of the decision of this Court in *Société des Hôtels le Touquet Paris-Plage* v. *Cummings* (1), and indeed the contrary was not argued.

The defendant sought to support the county court judge's decision by the argument that the payment to the plaintiffs in England of the equivalent, at the exchange at the date of payment, of 8100 francs ought in fairness and reason to have the same operation in regard to satisfying the debt as a payment of 8100 francs in France on the same day would have had. We feel the force of the argument, and we are not unmindful of the fact that precisely the same argument seems to have found acceptance by the majority (five out of nine) of the judges of the Supreme Court of the United States in the case of *Deutsche Bank* v. *Humphrey*. (2) We are, however, of opinion that, as the authorities in our Courts stand, the argument should be rejected, and that this Court ought, in agreement with the opinion of the four dissenting judges in the cited case, to hold that a creditor in respect of a debt incurred in a foreign currency is entitled, in a suit in our Courts, to recover the equivalent of the debt in our currency calculated according to the rate of exchange prevailing at the date when the debt became payable. Our reasons for this opinion are as follows.

(1) [1922] 1 K. B. 451.

(2) 272 U. S. Rep. 517.

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It is now settled law in this country, since the decision of the House of Lords in *S.S. Celia* v. *S.S. Volturno* (1), following and approving the decision of this Court in *Di Ferdinando* v. *Simon, Smits & Co.* (2), (1.) that in the case of a claim for damages for breach of contract, or in the case of a claim in tort for fixed and definite damage due to conditions determined at a particular date, the amount of damage has to be assessed by reference to the circumstances existing at the material date, namely, in the case of contract, the date of breach, and in the case mentioned above of tort, at the particular date for determination of the damage, and consequently (2.) that where in any such case the damages are primarily assessed in a foreign currency, the relief given by a Court in this country, which must express its judgments in sterling, must be calculated upon the rate of exchange prevailing at the material date, namely, in the case of contract the date of breach.

If this be the position the only question open in this Court would seem to be whether any distinction can in principle be drawn between the case of a claim in respect of breach of contract which results in relief by way of damages, and a like claim which results in relief by way of a judgment for a fixed sum. We can find no logical ground for such a distinction either in reason or in any principle which can be deduced from the decided cases; indeed counsel supporting the judgment below was not able to formulate any such principle, still less to point to any decided cases from which any such principle could be deduced.

It was argued, in our view correctly, that there is on the precise point no decision binding this Court. It is the fact that Lord Sumner speaking in the House of Lords on July 28, 1921, is careful to state the reasons given for his opinion in *S.S. Celia* v. *S.S. Volturno* (1) in terms which cover only the case of a claim for damages and do not expressly deal with a claim for a debt. It is also the fact that in *Société des Hôtels le Touquet Paris-Plage* v. *Cummings* (3) Atkin L.J. sitting in

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(1) [1921] 2 A. C. 544.
(2) [1920] 3 K. B. 409.
(3) [1922] 1 K. B. 451, 465.

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this Court on December 20, 1921, was careful to keep open the precise point which it now falls to us to determine.

It is, however, the fact that in the year 1921, the precise point was decided in favour of the appellants' contention, by a judgment which must in our opinion now be treated as deciding the matter conclusively so far as a Court of first instance is concerned. On March 15, 1922, P. O. Lawrence J. delivered two judgments, both in the matter of the liquidation of the *British American Continental Bank*. In the first case, *Goldzieher and Penso's Claim* (1), he had to deal with a claim for damages for breach of contract to deliver foreign currency; and in that case, as in the subsequent similar case, in the same liquidation, of *Lisser and Rosenkranz's Claim* (2) he had no difficulty in applying the principles enunciated in *S.S. Celia* v. *S.S. Volturno* (3) to the case of a contract to deliver foreign currency; and in each case his decision was affirmed in this Court. The second judgment, however, which P. O. Lawrence J. delivered on that day (*Credit General Liegeois' Claim* (4)) dealt with the exact point which is now before us, and is a clear decision that a claim in debt is on the same footing for the present purpose as a claim for damages for breach of contract. That case was not taken to the Court of Appeal; but the same conclusion was reached in *Peyrae* v. *Wilkinson* (5); and P. O. Lawrence J.'s decision was mentioned in this Court in *In re Chesterman's Trusts* (6) without any indication of disapproval, and indeed in a connection which suggests that Warrington L.J. felt no doubt as to the correctness of the principle on which it proceeds, a principle supported by the well known dictum of Vaughan Williams L.J. in *Manners* v. *Pearson*. (7) The exact point is one which must arise almost daily in commercial practice, and there is no indication to be found in the books that during the seventeen years since Lawrence J.'s decision it has been regarded as open to question. In these circumstances we should not be prepared to overrule that decision, even if we thought, as we do not, that any other conclusion could be reached consistently with the decision of the House of Lords in *S.S. Celia* v. *S.S. Volturno.* (1)

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(1) [1922] 2 Ch. 575.
(2) [1923] 1 Ch. 276.
(3) [1921] 2 A. C. 544.
(4) [1922] 2 Ch. 589.
(5) [1924] 2 K. B. 166.
(6) [1923] 2 Ch. 466, 485.
(7) [1898] 1 Ch. 581, 592.

Under these circumstances we propose to follow the decision of Lawrence J. in the case cited, and the appeal will be allowed. There will be judgment for the plaintiffs for the difference between the sum of 65*l.* 6*s.* 5*d.* and the sum of 105*l.* 6*s.* 4*d.* and for the costs below, and the defendant must pay the costs of this appeal.

Leave to appeal to the House of Lords will be granted if the defendant so desires.

Appeal allowed.

Solicitors for appellants: *Rowe & Maw.*
Solicitors for respondent: *Winter & Co.*

(1) [1921] 2 A. C. 544.

R. F. S.

BARROWFORD HOLDINGS, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

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Oct. 30.

Revenue—Income tax—Sur-tax—Company controlled by foreign company—Failure to distribute reasonable part of income to members—"Subsidiary company"—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21, *sub-ss.* 1, 6 (*as amended by s.* 31, *sub-s.* 3, *of Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10)).

A company, the control of which is in the hands of a foreign company by reason of the fact that the beneficial ownership of its shares is in the hands of the latter, is not a subsidiary company within the meaning of s. 21, sub-s. 6, of the Finance Act, 1922, as amended by s. 31, sub-s. 3, of the Finance Act, 1927, and the Commissioners, therefore, under s. 21, sub-s. 1, of the Act of 1922, where such controlled company has not distributed to its members in such manner as to render the amounts distributed liable to be included in their total incomes for the purposes of sur-tax a reasonable part of its income, have power to direct that the said income of the company shall be deemed to be the income of the members, and the amount thereof shall be distributed among the members.

Judgment of Lawrence J. [1939] 2 K. B. 607 affirmed.

APPEAL from the judgment of Lawrence J. on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners on July 5, 1938, the appellants, Barrowford Holdings, Ld., appealed against a direction made by the Commissioners under the Finance Act, 1922, s. 21, sub-s. 1, as amended by the Finance Act, 1927, s. 31, sub-s. 3 (1), in respect of the period from December 2, 1936, to April 5, 1937.

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(1) Finance Act, 1922 (12 & 13 Geo. 5, c. 17), s. 21, sub-s. 1, provides that in order to prevent avoidance of super-tax through the withholding from distribution to its members a company's income which would otherwise be distributable, the Commissioners may by notice direct that for purposes of assessment to sur-tax the said income shall be deemed to be the income of the members, and shall be apportioned among them.

Sub-s. 6 (as amended by s. 31, sub-s. 3, of the Finance Act, 1927 (17 & 18 Geo. 5, c. 10)): "This "section shall apply to any com"pany which is . . . . not a "subsidiary company . . . . For "the purpose of this sub-section, "a company shall be deemed to "be a subsidiary company if, by "reason of the beneficial ownership "of shares therein, the control of "the company is in the hands of "a company not being a company

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The appellant company was a private company incorporated on December 2, 1936, its business being to hold stocks and shares. It had a nominal and issued capital of 100*l*., divided into 100 shares of 1*l*. each. The whole of the shares were beneficially owned by C. D. Holdings, Ld., St. John's, Newfoundland, a company registered under the Companies Acts of Newfoundland. The appellant company made up its first accounts to April 5, 1937. A profit was shown of 344*l*., none of which was distributed. At the hearing of the appeal the company did not attempt to justify the retention of its profits by reference to the current requirements of its business or to such other requirements as might be necessary or advisable for the maintenance and development of that business.

It was contended on behalf of the company that it was a subsidiary company within the meaning of s. 21, sub-s. 6, of the Finance Act, 1922, as amended by s. 31, sub-s. 3, of the Finance Act, 1927 (1), and was therefore outside the terms of the section.

It was contended on behalf of the Crown that the company was not a subsidiary company within the meaning of that expression in s. 21, sub-s. 6, of the Finance Act, 1922, as amended.

The Commissioners were of opinion that the company was not a subsidiary company within the meaning of s. 21, sub-s. 6, of the Finance Act, 1922, as amended. They accordingly confirmed the direction, but stated this case.

On May 25, 1939, Lawrence J. gave judgment as follows: The question in this case arises upon the construction of s. 21, sub-s. 6, of the Finance Act, 1922. Is the appellant company, the shares in which are held by a foreign company, a subsidiary company within the meaning of sub-s. 6 (as amended) or not? If it is not, it is within the section, and

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"to which the provisions of this "section apply, or of two or more "companies none of which is a "company to which those provi- "sions apply: . . . ."

"The expression 'company' "means a company within the "meaning of the Companies (Con- "solidation) Act, 1908."

(1) See note (1), ante p. 81.

the direction of the Commissioners under s. 21, sub-s. 1, of the Finance Act, 1922, cannot be challenged.

It is contended for the appellant company that the C. D. Holdings Company, Ld., which controls the appellant company is "a company not being a company to which the provisions "of this section apply" within the meaning of the second paragraph of sub-s. 6, because it is not a company within the meaning of the Companies Consolidation Act, 1908, and that therefore the appellant company shall be deemed to be a subsidiary company.

In my opinion this contention is unsound. The section does not say "the provisions of this section do not apply to "companies which are not companies within the meaning of "the Companies Consolidation Act, 1908," but the expression "company" means a company within the meaning of the Companies Consolidation Act, 1908. It follows that the words "a company" where they first occur in the fourth line of the second paragraph of sub-s. 6, mean and mean only English companies. This reading does no violation to the qualifying words which follow for these are English companies which are not companies to which the provisions of the section apply.

The fact that this construction prevents the subsidiary of a foreign company from exemption from the provisions of the sub-section cannot, in my judgment, alter the clear meaning of the words used.

I am therefore of opinion that the Commissioners were right and the appeal is dismissed.

The company appealed. The appeal was heard on October 30, 1939.

H. Heathcote-Williams for the company, appellants, repeated substantially the same argument as he had advanced before Lawrence J.

Sir Donald Somervell A.-G. and *Reginald Hills* for the Commissioners of Inland Revenue were not called upon to argue.

SCOTT L.J. I agree with the judgment of Lawrence J.,

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and with the reasons on which it is based and I, therefore, think that this appeal should be dismissed with costs.

CLAUSON L.J. I agree.

GODDARD L.J. I agree.

Appeal dismissed.

Solicitors for appellants: *Francis White & Needham, for Frank Roberts, Sons & Baldwin, Nelson, Lancs.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

J. R.

E. WELLS AND SON, LIMITED *v.* SIDERY.

1939
Oct. 4, 13.

Criminal law—Road traffic—Permitting driving for continuous period of more than five and a half hours—Inclusion of period while driver standing by during loading and unloading—" Other work in connection with " vehicle—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 19.

While his lorry was being loaded and unloaded, the driver stood by, watching the work, eating and idling, taking no part in the actual work, but during that time he was, as driver, responsible for the lorry. His employers were charged with causing or permitting him to drive the lorry for a continuous period of more than five and a half hours contrary to s. 19, sub-s. 1 (i.), of the Road Traffic Act, 1930. He had been engaged in actual driving for an hour and a half, but in calculating the five and a half hours the above time of watching, etc., was sought to be included by the prosecution as a period of constructive driving, as being time spent by the driver " on other work in "connection with " the lorry or its load, within the meaning of s. 19, sub-s. 2 (*b*).

Held, that this was not time so spent, and, consequently, that no offence had been committed.

CASE stated by a metropolitan magistrate.

At a court of summary jurisdiction sitting at Tower Bridge police court on October 6, 1938, an information was laid by the respondent, George Stanley Sidery, against the appellants, E. Wells & Son, Ld., for that they on April 23, 1938, at Canon Beck Road, Rotherhithe, did permit one W. Aimes, employed by them, to drive a motor vehicle constructed to carry goods other than the effects of passengers, for a continuous period of more than five and a half hours, to wit, six and a half hours, contrary to s. 19, sub-s. 1 (i.), and sub-s. 4 of the Road Traffic Act, 1930. (1)

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(1) Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 19, sub-s. 1: "With a view to protecting the "public against the risks which "arise in cases where the drivers "of motor vehicles are suffering "from excessive fatigue, it is "hereby enacted that it shall not "be lawful in the case of . . . . "(*c*) Any motor vehicle constructed to carry goods other than the "effects of passengers; for any "person to drive or cause or per-"mit any person employed by "him or subject to his orders to "drive—(i.) for any continuous "period of more than five hours "and one half . . . ."

Sub-s. 2: " For the purposes "of this section— . . . . (*b*) any

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E. WELLS & SON, LD. v. SIDERY.

The following facts were proved or admitted:

The appellants were road transport contractors, and operated a large number of motor lorries and trailers in that business. The business material to the information consisted in carrying goods by lorries and trailers from docks and wharves to destinations within a small radius thereof. The lorries and trailers were manned by a driver, a driver's mate, and on some occasions by a third hand known as a trailer boy. The loading of the lorries and trailers at the docks and wharves was done by stevedores, loaders, or the drivers' mates, and the drivers did not take any part in such loading. The unloading at destinations was done by warehousemen or the drivers' mates, and the drivers took no part therein. These lorries and trailers were frequently delayed for long periods while waiting to be and being loaded and unloaded.

It was the duty of drivers to drive the lorries and trailers to and from the docks and wharves, and, where necessary, in and about them, to superintend the trailer boys while hitching and unhitching the trailers to and from the lorries before and after loading, and to wait at or near the docks and wharves until they were loaded. The drivers were responsible for their lorries while the same were waiting at or near the docks or their destinations.

On April 23, 1938, Aimes started work at 7 A.M. and, accompanied by one Bennett, he drove a lorry and trailer from the appellants' premises in the direction of Essex Wharf. At 7.30 A.M. he stopped for breakfast and resumed driving just after 8 A.M., arriving at Essex Wharf at 8.5 A.M. The lorry and trailer were loaded at Essex Wharf by Bennett until about 11.30 A.M. While they were being so loaded Aimes stood by, spending part of the time at a coffee shop near the wharf, and the remainder of the time in the company of other drivers, watching the loading or in idleness, and at no time during the loading did he do any work in connection with the lorry and trailer or the load being placed thereon.

"time spent by a driver on other "work in connection with a "vehicle or the load carried "thereby . . . . shall be reckoned "as time spent in driving."

At about 11.30 A.M. Aimes drove the lorry and trailer from Essex Wharf to a warehouse in Canning Town, the journey lasting just over half an hour. From 12.5 P.M. until 2.10 P.M. the lorry and trailer were being unloaded, the unloading being done by a warehouseman and an assistant, but Aimes was present and was responsible for his lorry. During part of the time he ate his dinner at a distance from the lorry and trailer, and at no time during the unloading did he do any actual work in connection with the lorry and trailer or with the goods being unloaded therefrom. He finished his work at 2.30 P.M. and went off duty until 8 P.M.

For the appellants it was contended that Aimes, while standing by as aforesaid, was not driving the lorry, and that on the said date he had driven it for one and a half hours only.

For the respondent it was contended that all the time, excluding periods of rest, between the hours at which Aimes commenced and finished his work was time during which he drove the lorry and trailer for the purposes of s. 19, sub-s. 1 (i.), of the Act, and that on the said date he drove them six and a half hours.

The magistrate found that Aimes at the material times exercised or could have exercised authority with reference to the work done by the trailers; and that he had a responsibility for his lorry, including its movement if and when necessary, and was acting under the direction of his employers. He, therefore, convicted the appellants and fined them 1*l.* 1*s.*, but stated this case.

Sir W. Jowitt K.C. and *David Karmel* for the appellants. The magistrate was wrong. Sect. 19, sub-s. 1 (i.), of the Act of 1930, was passed to protect the public from risks arising from driving by men who are excessively fatigued by too long hours of continuous driving. The case finds that the time during which Aimes was actually driving was only one hour and a half. To constitute the offence the respondent has to contend that Aimes was driving during the period from 8.5 A.M. to 2.30 P.M. The periods during which he was waiting were not periods of resting: see s. 31, sub-s. 1, of the Road and Rail Traffic Act, 1933 (23 & 24 Geo. 5, c. 53), but it does not follow they were constructively periods of driving. He was waiting, not driving.

[Lord Hewart C.J. Is not the antithesis between resting and driving? Is there an intermediate state?]

Yes, that during which the driver is neither driving nor resting, but waiting under the orders of his employers, as was Aimes. In *Jesner & Sons* v. *Waugh* (1) it was held that drivers waiting at their employers' depôt "subject," as the stated case set out, "to be called on at any time to do work" were not constructively driving. The magistrate has confused the criteria of resting with the criteria of driving.

Valentine Holmes for the respondent. The question whether a driver has been driving during a continuous period is one of fact, and the magistrate's finding ought not to be disturbed, although the Court might have found otherwise. A driver may still be said to be driving while his car is stopping for traffic lights, or to enable him to alight for refreshment, or while his mate delivers goods from it. It is a question of degree and, therefore, of fact. The current record of hours kept by the driver under s. 16, sub-s. 1, of the Road and Rail Traffic Act, 1933, and para. 5 of the Goods Vehicles (Keeping of Records) Regulations, 1934 (St. R. & O. 1934, No. 899), Form 2, is signed by the "driver" whatever the statement as to number of hours worked it may contain. There are not three different periods, driving, resting or doing neither, but the first two only. Aimes, as driver, was responsible for the lorry during the whole time of loading and unloading. By s. 19, sub-s. 2 (*b*), of the Act of 1930, time spent by him on other work in connection with the lorry shall be reckoned as time spent in driving. Waiting under conditions of responsibility and continuous liability to resume actual driving is "work" within that sub-section and he was earning wages as driver all the time. Therefore he was constructively driving.

Sir W. Jowitt K.C. in reply. The magistrate has said in effect: "I find the whole period was six and a half hours. On

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(1) 1936 S. C. (J.) 47.

"the question, how much is to be subtracted, I find that during "no part of that period was Aimes resting, therefore he was "driving." That is a conclusion of law.

Cur. adv. vult.

1939. Oct. 13. The judgment of the Court (Lord Hewart C.J., Charles and Humphreys JJ.) was read by Humphreys J. The relevant facts of this case, which is one stated by a metropolitan magistrate, are in a very narrow compass. The appellants, who are road transport contractors, were summoned for and convicted of an offence against s. 19, sub-s. 1 (i.), of the Road Traffic Act, 1930, in that they "on "April 23, 1938, at Canon Beck Road, Rotherhithe, in the "county of London did permit a person, to wit, W. Aimes, "employed by them to drive a motor vehicle . . . . con-"structed to carry goods other than the effects of passengers "for a continuous period of more than five hours and one-"half to wit six hours and thirty minutes." [His Lordship read s. 19, sub-s. 1, of the Road Traffic Act, 1930, and continued:] The only question raised by the case is whether Aimes, on April 23, 1938, did drive a lorry belonging to the appellants for any continuous period of more than five and a half hours. It appears from the findings in the case that Aimes was responsible for and in charge of that lorry on the day in question from 8.5 A.M. to 2.30 P.M. During that time he was "driving," using that word in its ordinary connotation, for a total period of not more than ninety minutes. Mr. Valentine Holmes for the respondent, however, has argued that "driving" in this section is equivalent to "being employed as and earning his "wages as the driver of the lorry," and he relied upon the language of s. 19, sub-s. 2 (*b*). Sub-s. 2 (*b*) is as follows: "(2.) For the purposes of this section . . . . (*b*) any time "spent by a driver on other work in connection with a vehicle "or the load carried thereby . . . . shall be reckoned as "time spent in driving."

In our opinion, it must be to a great extent a question of fact in each case whether a driver, though not actually driving, can properly be said to be spending his time on other work in connection with the vehicle or its load so that the time so spent by him in that other work may be reckoned as time spent in driving. What happened in this case is described by the learned magistrate as set out in the case. The magistrate in the earlier paragraphs had stated that Aimes drove the lorry which arrived at Essex Wharf at about 8.5 A.M., and then the case continues: "That the said lorry and "trailer were loaded at Essex Wharf by the said Bennett "and that the said loading continued until about 11.30 A.M. "That while the said lorry and trailer were being loaded as "aforesaid the said Aimes stood by, that he spent part of "the time at a coffee shop in the vicinity of the wharf, that "he spent the remainder of the time in the company of other "drivers watching the loading or in idleness and that at no "time during the said loading did he do any work in connection with the said lorry and trailer or with the load "which was being put upon the said lorry and trailer. That "at about 11.30 A.M. the said Aimes drove the said lorry and "trailer from Essex Wharf to a warehouse in Canning Town "and that the journey lasted just over half an hour. That "from 12.5 P.M. until 2.10 P.M. the said lorry and trailer "were being unloaded at the said warehouse, and that the "said unloading was done by a warehouseman and an assistant, "but the said driver was in attendance and was responsible "for his lorry. That while the said lorry and trailer were "being unloaded as aforesaid the said Aimes stood by, that "during part of the time the said Aimes ate his dinner at a "distance from the said lorry and trailer, and that at no "time during the said unloading did he do any actual work "in connection with the said lorry and trailer or with the "load which was being taken off the said lorry and trailer. "That the said Aimes finished his work at 2.30 P.M."

Whether those statements are regarded as findings of fact or as expressions of opinion, this Court is not prepared to dissent from them, and those statements appear to us to be conclusive upon the point raised in the case. It is not to be forgotten that s. 19 is expressed to protect the public against the dangers which may arise if drivers are suffering from excessive fatigue, and para. (i.) of sub-s. 1 deals with one of the ways in which excessive fatigue may be brought about, other ways indicated being the matters prohibited in paras. (ii.) and (iii.) of that same sub-section.

There is, therefore, no ground for giving a strained or unnatural meaning to the word "work" in s. 19, sub-s. 2 (*b*), so as to include watching other men at work or the eating his dinner at a distance from the lorry. Mr. Holmes also referred to and appeared to rely upon s. 19, sub-s. 2 (*a*). That paragraph runs as follows: "For the purposes of this section "(*a*) any two or more periods of time shall be deemed to be a "continuous period unless separated by an interval of not "less than half-an-hour in which the driver is able to obtain "rest and refreshment." In our opinion, that provision only comes into operation when there are found to be periods of driving which in the aggregate total more than five and a half hours. In this case we find there were not. It follows that in our judgment the learned magistrate in holding as he appears to have done that for the purpose of s. 19 Aimes' responsibility for the lorry was equivalent to spending his time on other work in connection with it, came to a wrong determination in point of law and the question asked of us in the case, which is, "whether, upon the above statement "of facts, I came to a correct determination and decision in "point of law," must be answered in the negative. The appeal is allowed and the conviction quashed.

Appeal allowed.

Solicitors for appellants: *Mawby, Barrie & Letts.*
Solicitor for respondent: *Treasury Solicitor.*

W. L. L. B.

Followed. Zeidman *v.* Owen
[1950] 1 K. B. 593

1939
Oct. 12, 13.

STOVELL *v.* JAMESON.

Gaming—Betting—Pool betting—Football pools—Using premises "as a "place where persons resorting thereto may effect . . . . pool betting "transactions"—Receipt of coupons and money for transmission elsewhere—Betting and Lotteries Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 58), *s.* 3, *sub-s.* 2.

The respondent, a tobacconist, was a collector for S.'s football pools, and on certain dates persons resorted to his business premises to deliver completed coupons and also sums of money owing on previous week's coupons. The coupons and money were sent by the respondent to S. in Edinburgh by post. By the conditions printed on the coupons S. had full discretion to accept or reject the entries when he received them.

On an information preferred by the appellant, a police inspector, the respondent was charged before justices with using his business premises as a place where persons resorting thereto might effect pool betting transactions, contrary to s. 3, sub-s. 2, of the Betting and Lotteries Act, 1934. For the respondent it was contended that the betting transactions were "effected," not on his premises but in Edinburgh, if and when S. accepted the entry and thus completed the contract. The justices dismissed the information, but at the request of the prosecution stated a case for the opinion of the Court:—

Held, that it was not necessary, in order that a betting transaction should be "effected" within the meaning of s. 3, sub-s. 2, that every step should be completed, and the bet which was offered be formally and authoritatively received; that the offence was committed and the mischief arose if that which was done was a substantial part of the business of betting; and that, therefore, the offence charged had been proved.

Case stated by justices.

An information was preferred before justices for the county borough of Croydon, by the appellant, Sidney Stovell, a sub-divisional inspector of the metropolitan police, against the respondent, Herbert William Jameson, a tobacconist and confectioner, charging him with using certain premises, situate at 2, New Parade, Cherry Orchard Road, Croydon, as a place where persons resorting thereto might effect pool betting transactions, contrary to s. 3, sub-s. 2, of the Betting and Lotteries Act, 1934. (1)

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(1) By the Betting and Lotteries Act, 1934, s. 3, sub-s. 1: "No pari "mutuel or pool betting business "shall be carried on on any "track, except:—

"(*a*) on an approved horse

On the hearing of the information the following facts were proved or admitted :—

The respondent was at all times relevant to the information a tobacconist and confectioner occupying and using premises at 2, New Parade, Cherry Orchard Road, Croydon. In September, 1938, he was appointed a collector for Strang's pools on the terms of a document signed by him. On October 6, 7, 14 and 21, 1938, persons resorted to the respondent's premises to obtain Strang's football pool coupons, with which the respondent was supplied by Strang. On October 6, 7, 14, 20 and 28, and November 4, 1938, persons resorted to the respondent's premises to hand to the respondent completed Strang's football pool coupons, and money owing to Strang on previous week's coupons, that the respondent might despatch by post such completed coupons and such money to Strang at his offices in Edinburgh. The respondent despatched by post the completed coupons to Strang's offices in Edinburgh, together with any money paid in respect of the previous week's coupons. Before despatching money to Edinburgh the respondent deducted commission due to him, at the rate of 5*s.* in the £ for Penny Points Pools and at the rate of 3*s.* in the £ for other pools. The coupons were entry forms containing the conditions on which they might be completed and submitted to Strang, and on which alone Strang might receive and accept or reject the coupons as entries. Persons (other than defaulters in respect of coupons previously sent in) were notified or caused to be notified by Strang in the event of their coupons not being accepted by him. Defaulters' coupons were treated as automatically rejected.

"racecourse by, or by authority "of, the Racecourse Betting "Control Board . . . .

"(*b*) on a licensed track being "a dog racecourse, in accordance with the provisions of "this Act which relate to "totalisators on dog race-"courses . . . .

Sub-s. 2 : "Save as is permitted "by the preceding sub-section, no "person shall use any premises "whether situate on a track or "not, or cause or knowingly per-"mit any such premises to be "used, as a place where persons "resorting thereto may effect "pari mutuel or pool betting "transactions."

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The justices were of opinion that the offence charged had not been committed by the respondent, but at the request of the appellant they stated this case for the opinion of the Court.

G. B. McClure (*Maxwell Turner* with him) for the appellant. The justices were wrong. The respondent should have been convicted of the offence charged against him, either on the view that he personally had used the premises for the purpose forbidden by the statute or on the view that Strang's pools were so using the premises through his instrumentality. An essential part of the pool betting transactions took place on the respondent's premises and that is sufficient to bring the respondent within the statute: *R.* v. *Wyton* (1); *Dunning* v. *Swetman* (2); *Stoddart* v. *Hawke* (3); *Lennox* v. *Stoddart* (4); *Samuel* v. *Adelaide Club, Ld.* (5); *Milne* v. *London (City) Police Commissioner.* (6)

Gilbert Beyfus K.C. and *D. A. Grant* (for *John C. Maude*, engaged on war service). The justices were right. The offence created by the statute is not committed unless pool betting transactions are effected, that is, carried out and finally completed, on the premises in question. In the present case a mere stage in the transactions took place on the respondent's premises and it is submitted that nothing which the respondent did offends against either the spirit or the letter of the Act. He was admittedly using the premises in question as a place where persons resorting thereto might do certain things, but unless all the necessary steps to complete a contract have taken place the transaction has not been "effected." It is clear from the printed conditions that the contract is not concluded until the entry has been accepted by Strang in Edinburgh. Pool betting by post on a credit basis is legal. The Legislature cannot have desired to say that it is illegal for coupons and money to be taken to a tobacconist to be forwarded by post, but legal for coupons and money to be taken to the Postmaster-

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(1) (1910) 5 Crim. App. Rep. 287.
(2) [1909] 1 K. B. 774.
(3) [1902] 1 K. B. 353.
(4) [1902] 2 K. B. 21.
(5) [1934] 2 K. B. 69.
(6) [1940] A. C. 1; 55 Times L. R. 898.

General for the same purpose. The present case is distinguishable from those cited on behalf of the appellant because the statutes under consideration differ materially in their wording. [*Attorney-General* v. *Luncheon and Sports Club, Ld.* (1), and *Streatham Cinema Ld.* v. *John McLauchlan, Ld.* (2), were referred to.]

LORD HEWART C.J. [stated the facts and continued:] In the course of the discussion before us we have had an interesting résumé of part, at least, of the voluminous law relating to betting, but I cannot help thinking that the real question falls (as the phrase is) within a very narrow compass.

Sect. 3, sub-s. 2, of the Betting and Lotteries Act, 1934, provides as follows: "No person shall use any premises ". . . . as a place where persons resorting thereto may effect ". . . . pool betting transactions." Every art and every science is entitled to some vocabulary of its own, and the vocabulary of the Legislature in this case is the expression "may effect pool betting transactions." One is reminded of the definition of an archdeacon as "a person who performed "archidiaconal functions." The mischief aimed at by the section is the use of a place where persons resorting thereto may effect betting transactions, or, in plain and simple English, may bet.

What is meant by this expression, "may effect betting "transactions," for there is no magic about the word "pool"? Before this Act of 1934 was enacted many Acts had been passed, and much had been written and said on the topic of betting. In particular, to mention only three of the labyrinth of cases more or less relevant and material, in 1902, in *Stoddart* v. *Hawke* (3), Lord Alverstone C.J. had spoken of that which was done in that case as being "no essential part "of the system." In the same year, Vaughan-Williams L.J., in *Lennox* v. *Stoddart* (4), spoke of "a material and necessary "step for the purpose of the receipt of the money"; and, not to multiply citations, in *Dunning* v. *Swetman* (5), some years later, Lord Alverstone spoke of " doing that which was "a substantial part of the business of betting."

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(1) [1929] A. C. 400.
(2) [1933] 2 K. B. 331.
(3) [1902] 1 K. B. 353, 359.
(4) [1902] 2 K. B. 21, 33.
(5) [1909] 1 K. B. 774, 777.

The argument of Mr. Beyfus is that there are, or may be, all kinds of tentative steps in the prolonged task of effecting a betting transaction, and it is not true to say that the betting transaction is effected unless and until it is in every respect and to all intents and purposes completed. He has used various words, to each of which I suppose a meaning is to be applied—" till the transactions are brought about," "accomplished," " concluded " and " completed." All those things, he says, are to be found latent in this word " effected," or, to vary the metaphor, the building is not completed until the coping stone is put on it.

I cannot think that that is the fair meaning of this subsection, whether one looks at it by itself, or in relation to all that had gone before. The draftsman had to use some verb if he was going to use a word like " transactions," and perhaps an obvious verb was " effect," but what does this expression " may effect pool betting transactions " mean ? Does it mean " carry out the process of making the trans-"action to the last possible step, so that it is a complete, "rounded, accomplished whole " ? I do not think that the mind of the Legislature was directed to any such point. The mischief aimed at was the user of places where persons resorting thereto might come and bet or make bets, and I think that the word " effect " is used to convey what had been said again and again in various antecedent cases, namely, " the doing of a substantial part of the business of "betting," " the carrying out of an essential part of the "system," or " the completion of a material and necessary "step for the purpose."

In the present case it is obvious that, subject to certain exceptions, as in the case of a defaulter or an infant, the moneys paid to the tobacconist were automatically received and passed on to Edinburgh. What took place on the respondent's premises was a mere apparatus for the collection of moneys to be paid for the purposes of betting and I think that it is really artificial and fantastic to seek to extract out

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of these words, "may effect betting transactions," something more comprehensive on the one hand, or more detailed on the other, than one would gain from the use of an ordinary simple verb.

In his argument, Mr. Beyfus laid great stress on the word "where" in sub-s. 2 of s. 3 in the sentence "as a place "where persons resorting thereto may effect . . . . pool "betting transactions." Let it be conceded that it is as if the words "as a place where" had been written "as a place "in which," or "as a place within the four walls of which "persons resorting thereto may effect transactions." That does not increase or diminish any difficulty there may be. The important words, in my opinion, are the words "may "effect betting transactions." What do they mean? Is it true to say that a betting transaction is not, within the meaning of this section, "effected," unless and until every step is completed and the bet which is offered has been formally and authoritatively received? The plain meaning of these words is, in my view, different from that, and the offence is committed, the mischief arises, if that which is done is a substantial part of the business of betting.

I think, therefore, that these justices came to a wrong conclusion in point of law, and that this appeal ought to be allowed, and the case go back to the justices with a direction that the offence which was charged was proved.

CHARLES J. I agree, and I have very little to add. Sub-s. 2 of s. 3 contains the words "may effect pool betting trans- "actions." It is urged on us that the true meaning of those words is that every single thing connected with the bet shall be completed and ended. It is very difficult to understand why effecting a betting transaction should be regarded as meaning anything other than betting. The words are different, but I cannot see anything in the words to justify the conclusion which we are asked to draw—that those words were put into the sub-section to elucidate the word "betting," and to introduce a meaning which case law has found that the word "betting" did not comprise. It is quite clear that,

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unless Mr. Beyfus can induce us to suppose that to " effect a "betting transaction " was to make a completed bet there and then, his case fails, because a long chain of authority on the word " betting " shows that it cannot be contended—though it was contended by Mr. Beyfus in *Samuel* v. *Adelaide Club, Ld.* (1), the decision in which was approved in *Milne* v. *Commissioner of Police* (2)—that a clubroom, to quote from the judgment of Atkinson J., " is not being used and cannot "be used for the purpose of betting unless the contract "involved in a bet is actually made in the room, and that in "law the contract is made where the bookmaker receives and "accepts the offer—namely, in his own office." The judgment continued : " Now the section " [that is, s. 1 of the Betting Act, 1853,] " does not say that the place shall not be used "by the forbidden person, but that it shall not be used for "the purpose of the forbidden person betting with persons "resorting thereto." Atkinson J. narrows it down, so as to make the matter almost an absurdity, by supposing that there were adjoining houses, and the bookmaker was in one house, and his agent was in the other, doing everything, or a substantial part of it, in house A, and the actual betting transaction completed and finished in house B, and he indicates that the evil aimed at by the section is precisely the same, as if the bookmaker were present in person with the backers, although he is in house B. It seems to me, I say again, to be straining the interpretation of the sub-section which is now under consideration to say that to effect betting transactions means, as was said in *Samuel* v. *Adelaide Club, Ld.* (1), that the betting must be a transaction completed in one and the same room to which the person was resorting. I do not think it means anything like it. It is quite clear that a substantial part of the betting transaction in this case did take place in this tobacconist's shop.

I think that the magistrates were wrong in their decision, as my Lord has said.

HUMPHREYS J. I am of the same opinion. We are called on to construe s. 3, sub-s. 2, of the Betting and Lotteries Act, 1934. In my view, the most important words for the present purpose are the first words of the section, which indicate what it prohibits. The section begins in this way—I leave out the immaterial words—"No . . . . pool betting business shall be "carried on . . . . except on an approved racecourse . . . . "or on a licensed dog racecourse," and then it continues: "Save as is permitted by the preceding sub-section, no person "shall use any premises . . . . as a place where persons "resorting thereto may effect . . . . betting transactions." I cannot myself doubt that those words, "may effect betting "transactions," have no wider or different meaning than saying that no person may use his premises for the purpose of the betting business, the prohibition of which is to be found in that section. I entirely agree with what has been said by the other members of the Court, and that the case should go back.

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(1) [1934] 2 K. B. 69, 74.

(2) [1940] A. C. 1 ; 55 Times L. R. 898.

Appeal allowed.

Solicitor for appellant: *Solicitor, Metropolitan Police.*
Solicitors for respondent: *Vardon & Corfield.*

A. W. G.

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Oct. 5.

NELSON AND ANOTHER *v.* COOKSON AND ANOTHER.

Public authorities protection—Limitation of actions—Servants or agents of authority—Medical officers of hospital—Public Authorities Protection Act, 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1 (*a*).

In March, 1937, the infant plaintiff entered a county hospital and was operated on for the removal of tonsils and adenoids by the defendants, who, at the time, were assistant medical officers of the institution. After the operation the second defendant, who acted as anæsthetist, placed a gag in the mouth of the patient to enable an examination of her throat to be made, and by reason of the gag, which was taken from a sterilizer, being too hot, the girl suffered severe burning of her left cheek, which resulted in a permanent scar. It was admitted that the hospital was an institution which the county council were empowered by the Local Government Acts, 1888 and 1929, to maintain for public health purposes, and, the writ in the present action having been issued more than six months after the act complained of, the defendants, while denying negligence, pleaded that the action was barred by s. 1 of the Public Authorities Protection Act, 1893 :—

Held, that the defendants were performing, as agents or delegates for and on behalf of the county council, a public duty or authority which the council could only discharge through other persons, and were entitled to the same protection as the Act of 1893 gave to the public body itself.

PRELIMINARY point of law set down for hearing before the trial of an action for damages for personal injuries, under Order XXV., r. 2, of the Rules of the Supreme Court.

The plaintiffs were Evelyn Muriel Nelson, an infant, suing by her mother and next friend, Muriel Constance Nelson, widow, and the said Muriel Constance Nelson. The defendants were Cyril Charles Cookson and Augustine Henry Lewis Baker, assistant medical officers of the West Middlesex County Hospital.

The following facts were admitted :—

The West Middlesex County Hospital was in April, 1930, transferred by the poor law guardians to the Middlesex County Council under the provisions of the Local Government Act, 1929. It was maintained by the county council under the provisions of the Poor Law Acts until April 1, 1936, when, with the sanction of the Minister of Health, it was appropriated

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for public health purposes, the council being empowered by the Local Government Act, 1888, as amended by s. 14 of the Local Government Act, 1929, to provide hospitals for public health purposes. The defendants were assistant medical officers of the hospital, each receiving a salary of 400*l.* a year from the council. At the time of the alleged negligence they were performing an operation on the infant plaintiff in pursuance of their duties as medical officers of the hospital.

On or about March 27, 1937, the infant plaintiff was admitted to the hospital to be operated on for the removal of her tonsils and adenoids. The operation was performed by Dr. Cookson on March 29, with the assistance of Dr. Baker, who acted as anæsthetist. After the operation Dr. Cookson wished to inspect the patient's throat, and Dr. Baker placed a gag in her mouth to enable him to do so. The gag, which was taken from a sterilizer, was too hot, and in consequence the infant plaintiff suffered a severe burning of the left cheek, resulting in a permanent scar.

The writ in the action was not issued until January 6, 1938. Both defendants, by their defences, denied negligence, and pleaded that the claim was barred by s. 1 of the Public Authorities Protection Act, 1893 (1), and on March 31, 1939, the Master ordered that the point of law raised by that plea be set down for hearing before the trial of the action, pursuant to Order xxv., r. 2, of the Rules of the Supreme Court.

H. C. Dickens for the defendant Cookson. These defendants were servants or officers of a public authority for the purpose of executing a public duty which was imposed on the authority. It is clear that the protection given by the Act of 1893 to a public authority extends to its servants when performing an act in pursuance of that authority: *Greenwell* v. *Howell.* (1) The protection has been held to extend to a medical officer of health. In *Venn* v. *Tedesco* (2) it was conceded that the defendants, medical officers of the Croydon Borough Hospital, were "within the class of individuals "covered by the Public Authorities Protection Act, 1893." He also referred to *Freeborn* v. *Leeming* (3); *Weir* v. *Thomas and Abson* (4); and *Jacobs* v. *London County Council.* (5)

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(1) By the Public Authorities Protection Act, 1893, s. 1: "Where after the commencement "of this Act any action, prosecution, or other proceeding is "commenced in the United Kingdom against any person for any "act done in pursuance, or execution, or intended execution of "any Act of Parliament, or of any "public duty or authority, or in "respect of any alleged neglect or "default in the execution of any "such Act, duty, or authority, "the following provisions shall "have effect: (*a*) The action, "prosecution, or proceeding shall "not lie or be instituted unless it "is commenced within six months "next after the act, neglect, or "default complained of . . . ."

A. A. Pereira for the defendant Baker.

Sidney H. Noakes (*Tristram Beresford K.C.* with him) for the plaintiffs. None of the authorities cited for the defendants deals with the point now before the Court. The protection given by the Act of 1893 has been in some cases assumed to apply to medical officers, but the point has never before, so far as can be ascertained, been taken in the precise form in which it is taken in this action. In no circumstances could the Middlesex County Council, on any of the facts alleged here, have been held responsible for the act of either of these defendants. The authority of the public body is merely to provide hospitals and skilled attention. The doctor and anæsthetist, as skilled men, exercise their own discretion as to how and when they shall carry out their duties and are not subject to the directions of any superior authority. It is, therefore, submitted that the protection of the Act does not extend to cover them. The defendants were merely carrying out their contractual duties to the local authority, under which they agreed to perform certain operations at the hospital, and it matters not one whit whether they were remunerated by salary or by fees. They were in the position of independent contractors, doing work for their own gain, and as such were not protected by the Act of 1893: *Thomas Tilling, Ld.* v. *Dick, Kerr & Co., Ld.* (6)

(1) [1900] 1 Q. B. 535.
(2) [1926] 2 K. B. 227.
(3) [1926] 1 K. B. 160.
(4) [1914] 79 J. P. 54.
(5) [1935] 1 K. B. 67.
(6) [1905] 1 K. B. 562.

A. A. Pereira in reply. Where a public body has to carry out its public duties through some individual it has always been contemplated that the same protection should be extended to that individual. There is no indication in the Act of 1893 that the person through whom the public body acts is not to be protected. *Greenwell* v. *Howell* (1) is a clear indication that persons acting on the authority of a public body are protected. He also referred to *Bradford Corporation* v. *Myers*. (2)

ATKINSON J. This matter comes before me on an order of the Master setting down as a preliminary point of law one of the defences raised by the defendants, because it appeared that if the defendants were right in their contention the action could be disposed of without the expense of a trial. The defendants claim to be entitled to the benefit of s. 1 (*a*) of the Public Authorities Protection Act, 1893, and the plaintiffs say that they are not so entitled. It is curious that the precise point now raised never seems to have been argued before, but it has been recognized as law for a long time that if some duty or act is done in pursuance of a public authority and is being carried out by a public authority through a servant or agent, that servant or agent has the same right to the benefit of this section as the public authority would have. That was treated as being the law in *Greenwell* v. *Howell* (1), and common sense would indicate that that must be the position, for a public authority must act by a servant or agent, and it would be idle merely to protect the public authority itself if the party complaining could still bring an action against the actual person who committed the act complained of.

I do not gather that it is challenged in this case that this as a general principle is undoubted law, but it is said that it is equally clear law that, if local authorities are not responsible in law for the negligence of their medical officers and therefore cannot be sued, the medical officers individually nevertheless can be sued. In such a case, that is, where you have acts done

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(1) [1900] 1 Q. B. 535.

(2) [1916] 1 A. C. 242.

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by an agent or servant in circumstances which would not render the authority liable to litigation it is said that the medical officer or other person acting cannot claim the benefit of the statute. That would be an interesting point to discuss, and I do not know but that I might have been disposed to give some weight to the argument if it were not that the contrary seems to have been recognized as law in quite a number of cases. I need only refer to two of them, both reported in 1926. The first is *Freeborn* v. *Leeming* (1), where the plaintiff alleged that he had been negligently treated by a medical officer in a workhouse infirmary and he sued the doctor more than six months after the termination of his attendance there. A question arose whether the six months started when the plaintiff began to suffer from the treatment or whether the period started from the date of the negligence alleged. That was the only point argued; but " it was admitted that so far as his [the medical "officer's] status and position were concerned he was so "entitled "—that is, that he was entitled to the protection of the Act. The case went to the Court of Appeal, and so far as I can see nobody, from first to last, threw any doubt on the soundness of that admission.

Then there is the case of *Venn* v. *Tedesco*. (2) There the action was brought by a widow, in respect of the death of her husband, against the medical officers of the Croydon Borough Hospital. Her husband had died within six months of the negligence alleged, but she had not brought her action until long after that period had expired. The point argued in the case was whether the time during which she could claim was governed by Lord Campbell's Act or by the Public Authorities Protection Act. McCardie J. decided that she was entitled to the time given by Lord Campbell's Act; but, again, it would have been a simple answer in that case to have said that the Public Authorities Protection Act did not apply to medical officers of health. I find in the learned judge's judgment this statement: " It is conceded that the "defendants are within the class of individuals covered by

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(1) [1926] 1 K. B. 160, 161.

(2) [1926] 2 K. B. 227, 228.

"the Public Authorities Protection Act, 1893." Knowing McCardie J. as I did, I am sure that he would not have accepted that admission if he had not thought that it was right.

In the circumstances, it is difficult to take a different view. When one finds that for a long time a certain view has been accepted as good law, it takes a great deal to convince one that it is a wrong view. I am not satisfied that it is wrong. Indeed, I think that it is right. It seems to me that these two defendants were exercising what was really a public authority, because it was an authority given to the Middlesex County Council to provide and maintain this hospital. The council could not exercise that authority by their own hands, but must act through other people, and on the relevant occasion their authority was being exercised by these two medical men. It seems to me idle to say that they were not acting in pursuance of a public duty and authority conferred on the Middlesex County Council. They were performing this public duty or authority, whichever you may like to call it, as agents or delegates for and on behalf of the council, and they are entitled to the benefit of the Act of 1893.

It seems to me hopeless to regard them, as I am asked to do, as independent contractors. The case relied on in support of that contention is *Thomas Tilling* v. *Dick, Kerr & Co.* (1), where it was held that the defendants were independent contractors. In that case Warrington J. said (2): "It has been "held that the protection of the [Public Authorities Protection] "Act extends to the officers of a public body and to persons "acting under their direct mandate: *Greenwell* v. *Howell and* "*Another* (3), but there is no case deciding that it extends to "independent contractors doing under contract and for their "own profit, the works which the public body is authorized to "do." It seems to me an absurdity to ask me to regard the defendants in this case as independent contractors, and not as officers of a public body performing duties imposed on a public authority which it cannot discharge except through servants

(1) [1905] 1 K. B. 562.
(2) Ibid. 570.
(3) [1900] 1 Q. B. 535.

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or agents. I think that what was conceded in *Freeborn* v. *Leeming* (1) and *Venn* v. *Tedesco* (2) is good law, and has been regarded as good law for so long that if it is desired to obtain a different decision the matter must be taken to a higher Court. That, I think, finally disposes of this case, and the action must be dismissed, with leave to the defendants to sign judgment for costs as between solicitor and client.

Point of law decided.

Solicitors for the plaintiffs: *Batchelor, Foord & North.*
Solicitors for the defendant Cookson: *Hempsons.*
Solicitors for the defendant Baker: *Le Brasseur & Oakley.*

(1) [1926] 1 K. B. 160.

(2) [1926] 2 K. B. 227.

A. W. G.

GOODBARNE *v.* BUCK.

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Oct. 9.

[1938. G. 2532.]

Insurance—Motor-car—Third-party liability—Registration of car in brother's name to avoid execution—Voidable policy—Avoidance of policy after accident—Whether brother liable for "causing" car to be used when no policy in force—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 35.

The defendant, W. E. B., required a motor-van for use in his business. The money for the purchase of the van was provided by his brother, H. A. B., and to avoid the possibility of the van being taken in execution by a judgment creditor of W. E. B. it was registered in the name of H. A. B. A proposal form for insurance was filled up by W. E. B. in which H. A. B. was described as the owner of the car and other false statements were made. A policy of insurance was issued and after W. E. B. had been involved in an accident causing the death of a third party the insurance company obtained judgment against both brothers declaring that they were entitled to avoid the policy for non-disclosure and misrepresentation.

The present action was brought by the widow and administratrix of the deceased man claiming damages against both brothers under the Law Reform (Miscellaneous Provisions) Act, 1934, and also under Lord Campbell's Act. W. E. B.'s liability was admitted. The claim against H. A. B. was based on the allegation that W. E. B. was a person of no substance and unable to satisfy any judgment against him and that H. A. B., in breach of his statutory duty under the Road Traffic Acts, had caused or permitted W. E. B. to drive the van while there was not in force in relation to the said driving a proper policy of insurance:—

Held, on the claim against H. A. B., that on the facts H. A. B. was not the owner of the van and had no power to prevent its user by W. E. B.; that, even if the brothers knew that the result of the use of H. A. B.'s name as owner and the other statements in the proposal form might invalidate the policy, the policy was voidable, not void, and unless and until the insurers avoided it (which they were not obliged to do), it was a valid and subsisting policy; and that, therefore, at the date of the accident W. E. B. was not driving the van without there being in force a policy of insurance. A fortiori H. A. B. did not cause or permit him to do so, and the claim against H. A. B. failed.

Monk v. *Warbey* [1935] 1 K. B. 75 distinguished.

ACTION tried by Hilbery J.

The defendants, Henry Albert Buck and William Edward Buck, were brothers. H. A. Buck carried on business as a butcher at 58, Brewery Road, Plumstead, and also at another address. W E. Buck carried on a greengrocer's business in the adjoining shop, 56, Brewery Road. H. A. Buck had no interest in that business.

For the purposes of his business W. E. Buck had a motor-van which he obtained on hire-purchase from a firm named Furlongs. After some dispute with them over repairs W. E. Buck ceased to pay the instalments due, and Furlongs retook the van and also obtained judgment in the county court against W. E. Buck for 50*l.*, which judgment remained unsatisfied. As W. E. Buck required a van for use in his business, H. A. Buck provided the money, 19 guineas, for the purchase of a second-hand van, and it was arranged that it should be registered in the name of H. A. Buck, to avoid execution by W. E. Buck's judgment creditor.

The insurance of the van was arranged through one Goldsmith, an agent of the Zurich General Accident and Liability Insurance Co., Ld. A proposal form was filled up, containing the following particulars (inter alia):

Full name of proposer: Henry Albert Buck.

Business address: 56, Brewery Road, Plumstead, London, S.E. 18.

Trade or business: Fruiterer and greengrocer.

Are you the actual owner of the vehicle ?—Yes.

Have you or has any other person who to your knowledge will drive been convicted of any offence in connection with any motor vehicle ?—No. (This was true of H. A. Buck, but W. E. Buck had been convicted of exceeding the speed limit and fined 10s.)

Are you now or have you been insured in respect of any motor vehicle ? If so, state name of company or underwriter—Yes, Co-operative. (This also was true of H. A. Buck, but untrue of W. E. Buck, who had had a previous policy with the Zurich company.)

The proposal form contained the usual warranty of the truth of the statements contained in it, and the words "I "agree that this declaration shall form the basis of the "contract." It was signed by W. E. Buck in the name of

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H. A. Buck, W. E. Buck being specified as the named driver. It appeared that the agent, Goldsmith, was aware of the arrangement between the brothers for the registration of the car in H. A. Buck's name and its user by W. E. Buck.

A policy was issued by the Zurich company on this proposal. On August 26, 1938, W. E. Buck, while driving the van, ran over a man named James William Goodbarne, who died in hospital a few hours later. On a claim being made, the Zurich company took proceedings against both brothers for the avoidance of the policy, on the ground of non-disclosure of material facts and false statements in the proposal form. On May 12, 1939, Branson J. gave judgment in that action in favour of the company and granted a declaration that the company was entitled to avoid the policy on those grounds.

In the present action the plaintiff, Mabel Goodbarne, as the widow and administratrix of James William Goodbarne, claimed damages against both brothers under the Law Reform (Miscellaneous Provisions) Act, 1934, and also under Lord Campbell's Act on behalf of herself and her infant son. The liability of W. E. Buck was admitted, and the case only calls for a report on the claim against H. A. Buck. That claim was based on the allegation that W. E. Buck was an impecunious person of no substance and unable to satisfy any judgment against him, and that H. A. Buck " in breach of his statutory "duty to the plaintiff under the Road Traffic Acts (1) knowingly "caused or permitted the second defendant to drive the said van "whilst there was not in force in relation to the said driving a "proper policy of insurance." The defendants denied that there was not in force in relation to the user of the car a proper policy of insurance and that either knowingly or otherwise H. A. Buck had been guilty of any breach of duty.

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(1) Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 35, sub-s. 1: " Subject to the pro- "visions of this Part of this Act, "it shall not be lawful for any per- "son to use, or to cause or permit "any other person to use, a motor "vehicle on a road unless there is "in force in relation to the user "of the vehicle by that person or "that other person, as the case "may be, such a policy of insur- "ance or such a security in respect "of third-party risks as complies "with the requirements of this "part of this Act."

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Picciotto K.C. and *McIntyre* for the plaintiff. On the facts, H. A. Buck was the owner of the van, which he purchased for the use of his brother. He permitted that brother, while uninsured, to drive the van, and he is liable to any third party who may suffer thereby, since W. E. Buck is clearly unable to satisfy any judgment: see *Monk* v. *Warbey.* (1) If, however, H. A. Buck was not the owner, he still caused or permitted the illegal user of the van while his brother was uninsured, by lending his name to a scheme for getting the van insured in his name. The policy so obtained was voidable, and the company having avoided it, it is as though no policy had ever been issued. The statements in the proposal form are expressly made the basis of the contract. The meaning of that expression was considered by the House of Lords in *Dawsons, Ld.* v. *Bonnin.* (2) Lord Dunedin there said (3) "It must mean that "the parties held that these statements are fundamental— "i.e., go to the root of the contract—and that consequently "if the statements are untrue the contract is not binding." This policy having been avoided for falsity of statements declared to be the basis of the contract, the avoidance relates back to the proposal, and there never was an insurance.

[HILBERY J. Do you say then that on August 26, W. E. Buck could have been convicted for driving an uninsured car?]

Logically, we must say that. To comply with the Road Traffic Act, 1930, s. 35, the policy must be "in force."

[HILBERY J. But the policy was voidable, not void. Non constat that an insurer will elect to avoid it. If the claim were small it might suit him better to pay it than to incur the odium of repudiating.]

W. A. L. Raeburn and *J. M. Symmons* for the defendants. H. A. Buck was not the owner of the van. He merely advanced the money for W. E. Buck to buy it. H. A. Buck had no power to control the use of the van by W. E. Buck, and *Monk* v. *Warbey* (1) is a completely different case. Whether or not H. A. Buck was the owner, the policy was only voidable, not void. The Zurich company might have chosen to abide by the policy, and accordingly until they had elected to avoid it and had obtained judgment that they were entitled to do so, the policy was valid and subsisting. By the express terms of the policy W. E. Buck was a person, and indeed the only person, entitled to drive the van, and therefore on August 26 this policy was "in force in relation to the user "of that van by W. E. Buck." He would have had a complete defence to any proceedings for an offence under s. 35 of the Road Traffic Act, 1930. If no offence was committed, obviously H. A. Buck did not cause or permit it.

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(1) [1935] 1 K. B. 75.

(2) [1922] 2 A. C. 413.

(3) [1922] 2 A. C. 413, 435.

Picciotto K.C. in reply.

HILBERY J. awarded the plaintiff 800*l.* damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and 2500*l.* (from which 720*l.* fell to be deducted in respect of the award under the Law Reform (Miscellaneous Provisions) Act, less 80*l.* estate duty, leaving 1780*l.* nett) under Lord Campbell's Act against W. E. Buck. He found that W. E. Buck was impecunious and unable to satisfy a judgment for those sums, and continued: The claim is put against Henry Albert Buck in this way. It is said that he was the owner of the van in truth and that he caused or permitted the user of that van on the road on the occasion in question when there was not in force in relation to the user of that vehicle by him or by his brother who was using it such a policy of insurance in respect of third-party risks as complied with the requirements of the Road Traffic Act, 1930. It is put in the alternative, that if he were not the owner, none the less he was the person who caused or permitted the user of the vehicle on the road when there was not in force a policy of insurance. [His Lordship found as a fact that H. A. Buck was not the owner of the van, and continued :] How does that affect the situation ? When the owner of a motor vehicle which, if it is to be used on the road, has to be covered by an insurance satisfying the requirements of the Road Traffic Act, allows it to be used on the road uninsured, he breaks one of the statutory duties imposed on him by the Road Traffic

Act, 1930, s. 35, sub-s. 1. It has been held in *Monk* v. *Warbey* (1) that where an owner of a motor-car causes or permits it to be driven uninsured and the person so driving it tortiously causes damage to another person, and it is then shown that, because the tortfeasor was uninsured, those damages are irrecoverable by the sufferer from the tort, then the sufferer from the tort can recover from the owner of the car a like sum as the measure of what he has lost but has been unable to recover from the tortfeasor. Here, as Henry Albert Buck was never the owner of the vehicle in question, he was not in a position to permit or to forbid William Edward Buck, to whom he had advanced money to enable him to buy the van, to drive the vehicle. I find nothing on the facts to show that, once he had lent the money and William Edward Buck had bought the vehicle, he could prevent William Edward Buck from driving it on the road. To say that he had lent him the money to buy it and therefore caused him to drive it, seems to me to give an entirely false meaning to the word "caused." To lend his brother money and thus enable him to have a vehicle which he may or may not insure is one thing. It is quite another thing to say that, by enabling him to have a vehicle which he might not insure, he caused him to drive it uninsured when he did drive it uninsured. An act which merely enables a person to be in a position to do something which is illegal is not an act which of itself causes a person to do the illegal act. H. A. Buck was not, as an owner, causing or permitting this van to be driven on the occasion in question and the present case is, therefore, distinguishable from *Monk* v. *Warbey*. (1)

What, however, is said is that, none the less, he caused or permitted it to be driven on that occasion without a valid insurance satisfying the requirements of the Road Traffic Act because he himself, on the statement that he had made, lent himself to an attempt by his brother to insure the van in his name. He must have known, it is argued, that the result of allowing his brother to do that, when it was not really his car, was to enable his brother to take out a policy which, it is said, was void. That seems to me to jump a good deal as between the premise and the conclusion. I am not satisfied at all that either of these brothers thought that they were getting out a policy which was invalid. In my view, they thought that they could validly do what they were doing. They did not realize that what they were doing would make the policy invalid. But even if I assume that they must be taken to have known that what they did in entering these answers on the proposal would produce only a policy which was a voidable policy, that seems to me to be a wholly different thing from saying that what they were doing was to bring about a state of affairs where there would be a policy which the company would necessarily avoid and which would mean that they would be driving the car from the start uninsured.

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(1) [1935] 1 K. B. 75.

It appears to me that this policy, from the time when the proposal form was filled up, and incorrectly filled up, was voidable, but that does not mean that it was void. In other words, if the insurance company never elected to avoid it, it was a valid and subsisting policy. The insurance company was not bound to come to the Court and elect to avoid it. I gave the example, in the course of the argument, of circumstances in which one might quite reasonably suppose that an insurance company, with a policy which it saw it could avoid, might still elect to pay a claim rather than go to the expense and bother of a law suit to get a declaration that they were entitled to avoid the policy, e.g., a small claim in the last week of the year of life of the policy. In such a case, it may well be, the company learns that it has an unanswerable case for avoidance, but, none the less, it decides that it is cheaper and better business to pay rather than to elect to avoid. The policy in the present case, therefore, being voidable, and there having been no avoidance, the car was being driven with a valid insurance on it at the time of the accident.

It is true that as between the immediate parties to a policy and in considering the rights and liabilities which it purported to create, when once there has been a declaration of avoidance by the Court, it is as though the risk had not been written between the parties, but it does not follow that for the purpose of the consideration of s. 35, sub-s. 1, of the Road Traffic Act, 1930, for all purposes the policy must be regarded as never having been in existence at all. The question which has to be determined under the section is whether, at the time when the accident happened and the motor vehicle in question was being used, some person caused the user by another person of that motor vehicle on the road "when "there was not in force in relation to the user of the vehicle "by that person or that other person, as the case may be, such a "policy of insurance or such a security in respect of third-party "risks as complied with the requirements of this part of the Act." It is to be observed that the words are "unless there *is* in force "in relation to the user of the vehicle . . . . , such a policy . . . . as "complies with the requirements of this part of the Act." What has to be looked at is this: Was there a policy which was in force at the time when the user of the vehicle was being had? As between the parties to this action, the fact that the rights which were created by the contract of insurance were subsequently avoided, does not, it seems to me, prevent there having been a policy in force at the time of the user of the vehicle which is in question. At that time there had been no avoidance of the policy and there might never have been any avoidance of it if the insurance company had chosen to abide by it.

Looking, therefore, at the time when the tortious act and the user in question occurred, it follows that there was in fact at that time a policy in respect of the car which complied then with the terms of the Act. To hold otherwise would have a very far-reaching effect. For example, W. E. Buck, I suppose, would have no answer to a summons in respect of every day on which it could be shown that he had driven the vehicle, although he had a certificate of insurance of the vehicle which had been issued to him in respect of the voidable policy. Moreover, if the contention advanced by the plaintiff were right, the result would be that any car owner who has a policy but not the least conception that there is any ground on which the company may avoid it, if none the less there exists a ground on which the company do avoid it, may find himself liable to prosecution in respect of every day

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on which he has driven the car with a certificate of insurance in his pocket which appears to comply with the requirements of the Act. He would be liable as well to pay out of his own pocket the damages of some third party who could not get satisfaction of a judgment against some impecunious driver whom the owner had quite properly authorized to drive in the belief that he was covered by the policy, though it turned out that he was not.

I am satisfied that for these reasons the claim fails as against Henry Albert Buck and there must be judgment for him.

Judgment for plaintiff against W. E. Buck.
Judgment for defendant H. A. Buck.

Solicitors for plaintiff: *Evill & Coleman.*
Solicitor for defendants: *W. T. Donovan.*

J. W. H.

C. A.

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DAVIS *v.* FOOTS AND ANOTHER.

Landlord and tenant—Premises let with gas pipe in dangerous condition—Injury to tenant—Gas-fire—Removal by landlord before commencement of tenancy—Liability of landlord.

The plaintiff agreed to hire a flat from August 28 from the defendants who owned the flat and had lived there. The female defendant asked the plaintiff whether she would like to have a gas-fire which was in one of the bedrooms. The plaintiff said she would not require it, and the female defendant then said that she would have it taken out. The defendants' son on August 26 removed their furniture from the flat, and also disconnected the gas-fire and removed it, but he did not leave any tap on the pipe from which the gas-fire had been disconnected by which gas could be prevented from escaping into the room. The plaintiff married on September 4 and her husband on the morning of that day got a representative of the gas company to turn the gas on at the meter with the result that the gas immediately began to escape into the bedroom. The plaintiff and her husband occupied the bedroom that night with the result that they were both asphyxiated by the gas, and the plaintiff's husband died of gas poisoning and the plaintiff became very ill but recovered. In an action by the plaintiff:—

Held, that the defendants were not liable to the plaintiff in damages, as a landlord of an unfurnished house, in the absence of an express contract, is not liable to the tenant for defects in the house rendering it dangerous or unfit for occupation, even if he has brought about the defect itself or is aware of its existence.

APPEAL from a decision of Wrottesley J. at the Newcastle-upon-Tyne Assizes.

The plaintiff, now a widow, in August, 1938, was about to get married. She and her prospective husband approached the defendants, who were the owners and occupiers of a flat in Seaham Harbour, which they were proposing to leave. The defendants were willing to let the flat to the plaintiff and her prospective husband. It was agreed that the plaintiff and her prospective husband should become tenants of the flat from the defendants as from Saturday, August 28, at a rent of 13*s*. a week.

On August 26, the defendants' furniture was moved out from the flat by young Foots, the son of the defendants, who was a ship's carpenter. Among the furniture and other chattels belonging to the defendants which were so removed, young Foots removed from its fixture in a grate a gas-fire, which was the property of the defendants. At that time the gas was turned off at the meter. Young Foots unscrewed the connection between the gas-fire and the pipe, which, when the gas was turned on at the meter, led the gas to the gas-fire. When young Foots so removed the gas-fire, he did not leave on the pipe that he disconnected any tap that could be turned off, or other means of stopping the escape of gas. The result was, that after the defendants' furniture was removed from the flat, there was the potential danger that if anyone came there and turned on the gas at the meter without going round the house to see that the various pipes had their taps turned off or had taps which could be and were turned off, there would be an escape of gas.

Before August 26, the day on which young Foots removed the gas-fire along with the other furniture belonging to the defendants, there was a conversation between the first defendant, Mrs. Foots, and the plaintiff. Mrs. Foots said on going round the flat with the plaintiff: "Here is this gas-"fire." It was a chattel belonging to Mrs. Foots. She asked the plaintiff if she and her prospective husband would like to have it and make use of it. The plaintiff said they would not require it and did not want it. The plaintiff giving evidence said in answer to the question, "Did Mrs. Foots "say anything when you said you did not want it?" "She said she would have it taken out."

On September 4, the marriage of the plaintiff and her husband took place, and they went into occupation of the flat which they had taken from the defendants. They arrived there late at night and went to bed in the bedroom from which the gas-fire had been removed on August 26 by young Foots. Earlier on September 4, at 11 o'clock in the morning, the plaintiff's husband immediately before going to his wedding brought the gas company's representative to the flat who turned on the gas at the meter, and therefore gas must have been escaping from this disconnected pipe into this room ever since 11 o'clock in the morning. The plaintiff said that there was a smell in the room, but thought that it was due to the new furniture and linoleum. She had not had previous experience of gas and did not recognize the smell. The plaintiff and her husband went to bed in ignorance of the fact that the gas had been pouring into the bedroom since the morning. The result was that both the plaintiff and her husband became unconscious and remained unconscious until they were found by relations on Monday morning. The plaintiff's husband died of gas poisoning. The plaintiff became very ill as a result of the gas poisoning, but eventually recovered.

The plaintiff brought this action against the defendants, alleging that they were liable to the plaintiff for compensation by way of damages to her in respect of this disaster, through the escape of gas and the loss of her husband.

Wrottesley J. found in her favour and awarded her 350*l.* damages.

The defendants appealed. The appeal was heard on October 5, 6, 1939.

J. Charlesworth for the appellants. The learned judge was wrong in drawing the inference from the admitted facts and the evidence that there was negligence on the part of the defendants, and he was wrong in law in holding the defendants liable to the plaintiff. The gas-fire was removed on August 26, and any resulting danger existed on that date. The plaintiff's tenancy did not commence till August 28. If a landlord lets premises which are obviously in a dangerous state, he is under no liability for damage which may be caused to the tenant by the state of the premises. There was no obligation on the defendants to see that, at the beginning of the tenancy, all the gas taps in the flat were turned off. A landlord owes no duty to his tenants to make the premises safe: *Bottomley* v. *Bannister.* (1) In that case Scrutton L.J. said (2): "Now it is at present well established English law "that, in the absence of express contract, a landlord of an "unfurnished house is not liable to his tenant . . . . for "defects in the house . . . . rendering it dangerous or unfit

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(1) [1932] 1 K. B. 458.

(2) Ibid. 468.

"for occupation, even if he has constructed the defects himself "or is aware of their existence." See also *Shirvell* v. *Hackwood Estates Co.* (1)

[MACKINNON L.J. referred to *Parry* v. *Smith.* (2)]

The principle is thus stated in Sir John Salmond's work on Torts, 9th ed., p. 538: "Apart from any express contract "to that effect, a landlord owes no duty . . . . towards his "tenant . . . . to take care that the premises are safe either "at the commencement of the tenancy or during its continuance." The question whether the decision of the House of Lords in *Donoghue* v. *Stevenson* (3), has effected the validity of the decision in *Bottomley* v. *Bannister* (4), was considered by Atkinson J. in *Otto* v. *Bolton and Norris* (5), and he came to the conclusion that the law as laid down in *Bottomley* v. *Bannister* (4), had not been affected by the decision of the House of Lords in *Donoghue* v. *Stevenson.* (3)

Cyril Salmon for the respondent. The decision of the learned judge was correct. The landlords and tenant agreed that the landlords should remove the gas-fire; there was an undertaking by the landlords that the gas-fire should be removed, and there was consequently an obligation upon the landlords to see that there was no negligence in removing the gas-fire. There is no difference between the present case and *Wilkinson* v. *Coverdale* (6), where it was held that a mere offer of service even though without consideration imposes a liability upon the person who does the service if it is done negligently.

[DU PARCQ L.J. If a landlord removes something from premises before they are let he does so for his own purposes and not by reason of the contract of tenancy.]

The cases of *Cavalier* v. *Pope* (7), *Lane* v. *Cox* (8), and *Bottomley* v. *Bannister* (4), do not negative the obligation upon a landlord not to be negligent. The distinction between the present case and *Bottomley* v. *Bannister* (4), is that in the present case the misfeasance took place after the contract

(1) [1938] 2 K. B. 577.
(2) (1879) 4 C. P. D. 325.
(3) [1932] A. C. 562.
(4) [1932] 1 K. B. 458.
(5) [1936] 2 K. B. 46.
(6) (1793) 1 Esp. 75.
(7) [1906] A. C. 428.
(8) [1897] 1 Q. B. 415.

of tenancy was entered into, while in that case the act complained of took place before the contract of tenancy was entered into. The reason why the landlord was held not liable in that case was because the tenant had the opportunity of examining the premises and that consequently the tenant took possession of the premises as he found them. But it would be extending the principle too far to extend it to something which took place after the contract of tenancy was made. Apart from authority a negligent act of misfeasance by a landlord would give the tenant a right of action. There is no real difference between a negligent act of misfeasance committed by a stranger and one committed by the landlord. None of the authorities cover a case where the negligent act of misfeasance is committed after the contract of tenancy is entered into, and therefore those authorities do not apply to the present case. In the case of *Bottomley* v. *Bannister* (1), the Court were not considering the question of misfeasance at all ; they decided the case upon the particular facts of that case which were very different from the facts of the present case. Greer L.J. (2), made it clear in that case that the material date was the date of the tenancy agreement and not the date when the tenant entered into possession. The tenant takes the premises as he finds them at the date of entering into the tenancy agreement. Scrutton L.J. was only stating the law in *Bottomley* v. *Bannister* (3), as applicable to the facts of that case.

MacKinnon L.J. [stated the facts set out above and continued :] One most extraordinary feature of this case is that, upon the findings of the learned judge, which we accept, gas must have been escaping from this disconnected pipe in this room ever since 11 o'clock in the morning. So one would suppose that when the plaintiff and her husband went there to go to bed late at night there would have been an appalling smell of gas. The plaintiff said that there was a smell in the room, but she thought it was due to their new furniture and linoleum—she herself had not had any previous experience of gas, and did not recognize the smell.

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(1) [1932] 1 K. B. 458.
(2) Ibid. 477.
(3) Ibid. 468.

Upon the facts as I have stated them, I think there can be no doubt that in law the defendants are not liable to the plaintiff: The law is stated by Scrutton L.J. in *Bottomley* v. *Bannister* (1), in a single sentence which is all that I need cite: "Now it is at present well established English law that, in "the absence of express contract, a landlord of an unfurnished "house is not liable to his tenant . . . . for defects in the "house . . . . rendering it dangerous or unfit for occupation, "even if he has constructed the defects himself or is aware "of their existence." In other words the defendants, the landlords, let this house to the plaintiff with a disconnected pipe from which gas could escape when the gas was turned on at the meter. That, of course, may be said to be a dangerous defect: But the principle being what I have stated and being one which has been recognized over and over again, the defendants are not liable for that defect. It is the tenant's business, when he takes possession of a house, to discover and remedy any danger that may exist. In this case quite obviously it did not need the exercise of a great deal of care for anyone who was turning on the gas in a house where it had been turned off at the meter for some time, to go round the house and see that the various pipes into which the gas would be admitted were safe, and were not leaking. Therefore upon the facts—namely, that the son of the defendants removed this gas-fire and left the end of the pipe without a tap to prevent the escape of gas into the room, I think that the defendants are not responsible for the resultant disaster.

There is one further fact which I should mention. Before young Foots removed this gas-fire on August 26, there was a conversation between the first defendant, Mrs. Foots, and the plaintiff with reference to the gas-fire. Mrs. Foots asked the plaintiff if she and her husband would like to have the gas-fire and make use of it. The plaintiff replied that they would not require it and did not want it. Conversation then took place and this is the only evidence with regard to it. The plaintiff was asked the following question: "Did Mrs. Foots "say anything when you said you did not want it?" The plaintiff's answer to the question was: "She said "she would have it taken out." Upon that simple piece of conversation there has been based a contention, which was accepted by the learned judge who tried the case, that there was an undertaking by the defendants to do that work for the plaintiff; and that there was implied in that undertaking that they would do that work with reasonable care and skill. I do not think that there was any undertaking to do work for the plaintiff; so there could not be any undertaking to use reasonable care and skill in doing any work for the plaintiff. The defendants were not doing any work for the plaintiff at all. The plaintiff had no interest, right or property in the gas-fire. It was a chattel belonging to the defendants. The remark of Mrs. Foots: "Well then "I will have it taken out" was merely a statement that if Mrs. Davis did not require the article and therefore was not prepared to bargain as to the terms on which she might have the gas-fire, Mrs. Foots would retain possession of it. It was merely a statement by Mrs. Foots: "Very well, then I will "take away my chattel." There was no undertaking to do any work, or do anything for the plaintiff in regard to any article in which the plaintiff had any interest or property at all. In those circumstances I am unable to see from that simple conversation consisting of one question and one answer: "Will you want this gas-fire?" "No." "Very well, then "I will take it away," that I can extract any contractual obligation by these defendants to exercise any care and skill with regard to the gas-fire, the breach of which undertaking would create any liability for its consequences upon the defendants to the plaintiff.

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(1) [1932] 1 K. B. 458, 468.

In the result I think that the plaintiff has no cause of action in respect of this very lamentable disaster against the defendants, and that the judgment of the learned judge was wrong in awarding her damages. This appeal must therefore be allowed, and judgment entered for the defendants.

DU PARCQ L.J. I have come to the same conclusion. The case as pleaded is not based on the undertaking or agreement on which the learned judge has founded his decision; but, speaking for myself, if I had thought that the learned judge's decision could be supported on that ground, I should have felt no difficulty in saying that the pleadings ought to be amended in order to enable us to give effect to the learned judge's decision.

I think, however—and I have very little to add to what has been said—that it is impossible on that ground, or on any ground, to support the decision to which the learned judge came. Undoubtedly, some support is to be found for the learned judge's decision in a statement of the learned writer's view of the law in Sir John Salmond's work on Torts, 9th ed., p. 541; but I cannot find any authority binding on this Court to support the learned judge's view. On the contrary, the authorities seem to me to be against it.

It is beyond question that the relationship of landlord and tenant did not impose any liability on the landlord here. If a landlord lets premises in a dangerous condition, and that is the only fact relied upon, without more, no liability rests upon the landlord for the consequences of that dangerous condition. I cannot find here any express contract to leave the premises in a safe condition. All that happened was that on some date which is not specified, before August 26, the landlady said that, as the tenant would not require the gas-fire which was in the bedroom, she would remove it before the tenancy began. She would be bound to remove it in any case for her own purposes; and she was not undertaking to do any more than that which a contract of letting would impose upon her, that is, let the premises as they stood without the gas-fire to the tenant. As has been said already by my Lord, it is impossible to found any claim on the authority of *Wilkinson* v. *Coverdale* (1), a case which I think has long been regarded as quite accurately stating the law. If somebody chooses to undertake an obligation, even gratuitously, to do

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(1) 1 Esp. 75.

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a service to another person, and does it negligently, he may well render himself liable. But here—I do not repeat the reasons which have been given—there is no question of the defendants doing a service for the plaintiff or her husband at all.

The only remaining question is whether there is some liability in tort; and whether one can apply to this case the wide principle stated in *Donoghue* v. *Stevenson*. (1) As to that, I would only say this. I think some assistance is to be derived from the careful judgment of Atkinson J. in *Otto* v. *Bolton and Norris*. (2) I think there may be other reasons why it is impossible to apply here the principle, as I have called it shortly, in *Donoghue* v. *Stevenson* (1); but one conclusive reason against applying it to such a case as this is to be found, I think, in that judgment in *Otto* v. *Bolton and Norris*. (2) I will only read a part of the head-note for the purpose of showing what I mean: "The principle laid down "in *Donoghue's* case (1), is that there can be no duty cast "upon the vendor without proximate relationship, of which "the main test is whether there is reasonable opportunity "for examination between the time of the sale or the doing "of the work and the use or consumption of the article by the "purchaser." Making the necessary changes in that sentence, one would ask here whether there was a reasonable opportunity for examination between the time when the work was done and the time when the premises were used and the gas turned on. It is at once apparent that there was ample opportunity. The fire was removed by Foots on August 26. The keys were handed to the plaintiff or her husband on Saturday, August 28, although the landlady still retained one key, because she had some furniture which she wished to remove. On Monday, August 30, the tenants went in and looked round the premises, although they did not immediately occupy them. This was not a latent defect. It was quite apparent on examination, and one would think only too plainly apparent as soon as the gas was turned on. One would have said it was inevitable that it would be noticed.

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(1) [1932] A. C. 562.

(2) [1936] 2 K. B. 46.

I therefore cannot find any ground on which the judgment of the learned judge can be supported; and I agree that this appeal should be allowed.

BENNETT J. I also agree. The only ground upon which the learned judge decided the case in favour of the plaintiff was the undertaking which one of the defendants, Mrs. Foots, is said to have given to the plaintiff. My Lord has already referred to the question and answer of the plaintiff, which is the foundation of the learned judge's conclusion that Mrs. Foots did give an undertaking to the plaintiff. But, for myself, I am unable to infer from the question and the answer any undertaking of any kind given by Mrs. Foots to the plaintiff. For these reasons it seems to me that the foundation for the learned judge's judgment disappears; and, accordingly, I agree with my Lord and with du Parcq L.J., that the appeal must be allowed and judgment entered for the defendants.

Appeal allowed.

Solicitors for appellants: *Maples, Teesdale & Co., for Wright and Ellis, Seaham Harbour.*

Solicitors for respondent: *Isadore Goldman & Son, for Lionel Wolfe & Hewitt, Sunderland.*

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[1938. C. No. 592.]

Bankruptcy—Trustee—Powers exerciseable by with permission of committee of inspection—To carry on business of bankrupt for beneficial winding-up—Contract between trustee and third party that in consideration of trustee carrying on business guarantor will safeguard trustee and estate from all loss—Purpose for which contract entered into—Validity of contract—Enforceability of guarantee—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 56, *sub-ss.* 1, 2 ; *s.* 79, *sub-s.* 1.

Emergency legislation—Application for leave to enforce judgment —Objection on ground not connected with war—Leave to enforce judgment—Courts (Emergency Powers) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 1*—Courts (Emergency Powers) Rules,* 1939, *r.* 9.

The Bankruptcy Act, 1914, s. 56, provides: "The trustee "may, with the permission of the committee of inspection, do "all or any of the following things :—(1.) Carry on the business "of the bankrupt, so far as may be necessary for the beneficial "winding-up of the same."

A contract between a trustee in bankruptcy, with the approval of the committee of inspection, and a third party provided that in consideration of the trustee carrying on the business of the bankrupt for such time as the committee should decide, the third party guaranteed him against all and every loss which might be sustained by him or by the estate by reason of the business being carried on. It was found as a fact that the contract was entered into by the parties not solely with a view to the beneficial winding-up of the business, but also in order that the business might be carried on for the benefit of the bankrupt. A loss having been sustained in the carrying on of the business, the trustee brought an action upon the guarantee against the third party to recover the amount lost :—

Held, by the Court of Appeal (Slesser and MacKinnon L.JJ., du Parcq L.J. doubting but not dissenting), reversing the judgment of Charles J., that although the contract, by reason of one of its purposes being to carry on the business for the benefit of the bankrupt, was not in accordance with the above sub-section, the object of which was to protect the estate as between the trustee and the creditors, yet, as between the trustee and the third party, it was not in the circumstances invalid or unenforceable as being either ultra vires the capacity of the trustee to enter into, or necessarily opposed to the public policy of the Bankruptcy Acts, or made without consideration on the part of the trustee, since his carrying on of the business was a consideration which was not void as being illegal; and, consequently, that the trustee was entitled to maintain the action and to recover the amount claimed.

Lee v. *Sangster* (1857) 2 C. B. (N. S.) 1; and *In re Branson* [1914] 2 K. B. 701 applied.

Ex parte Emmanuel. In re Batey (1881) 17 Ch. D. 35 considered.

Under the Courts (Emergency Powers) Act, 1939, s. 1, an application to the appropriate Court for leave to enforce a judgment will not be refused on an objection which is not connected with the present war.

APPEAL from the judgment of Charles J. in an action tried by him without a jury.

For some time before the date next mentioned Mr. William Thomas James had carried on the business of a restaurant and hotel proprietor at Nos. 63 and 64, Queen's Road, Brighton. The business was unsuccessful and on November 10, 1937, a receiving order was made against him in the Brighton and Lewes County Court.

On November 11, 1937, Mrs. Agnes May Smith gave to the official receiver a guarantee up to the sum of 50*l.* in consideration of his allowing Mr. James to carry on the business until the first meeting of creditors should be held, and in pursuance of that guarantee the official receiver carried on the business of the estate from the date of that guarantee.

On November 13, 1937, an order of adjudication was made against Mr. James and on December 3, the first meeting of creditors was held. At this meeting Mr. Leslie Colbatch Clark was appointed trustee and three named persons were appointed to be the committee of inspection.

On December 31, 1937, the first meeting of the committee of inspection was held. The trustee after mentioning the gross takings of the café for the period during which it was carried on by the official receiver and for three additional weeks to December 28, 1937, and estimating what the charges for rent, rates, lighting, heating and other amounts were, stated that after allowing for these charges the loss made during the official receivership period of trading was approximately 27*l.* He thought that this would be made up during the Christmas period although definite figures were not yet available. There was no doubt that the hotel would not pay its way during the winter, but it was anticipated that there would be a considerable profit during the summer. The

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trustee stated that an offer of 200*l.* for the stock, furniture, fixtures and fittings and any goodwill had been received from Mr. E. Tully, subject to payment of rent and rates, but it appeared that, if that offer were accepted, there would not be sufficient to pay the preferential creditors, and there could not be any dividend for the unsecured creditors. Consequently, it was resolved that the hotel should be carried on for the present, and that Mrs. Smith should be asked to renew the guarantee which she had given to the official receiver.

Early in January, 1938, the loss in carrying on the business amounted to over 50*l.*

On January 12, 1938, Mrs. Smith gave to the trustee a guarantee in the following terms: "In consideration of "your carrying on the business heretofore carried on by "William Thomas James for such time as the committee of "inspection appointed to superintend the administration of "the property of the bankrupt shall decide, I, the undersigned, "hereby undertake that the estate of the said William Thomas "James shall not be diminished in any way whatsoever, and "guarantee you against all and every loss which may be "sustained by you or the estate of the said William Thomas "James by reason of such business being carried on." In pursuance of that second guarantee the trustee continued to carry on the business until September 18, 1938.

On May 16, 1938, the second meeting of the committee of inspection was held, at which the trustee reported a further loss on trading.

On September 18, 1938, the trustee discontinued the carrying on of the business.

On November 17, 1938, the third meeting of the committee of inspection was held, at which the trustee reported an additional loss.

On November 28, 1938, the trustee, hereinafter called the plaintiff, brought the present action against the guarantor, hereinafter called the defendant, claiming to recover the sum of 138*l.* 15*s.* 3*d.* as money due from her under her guarantees.

The defendant by way of defence alleged (inter alia) that the guarantees were illegal, void and unenforceable, inasmuch as they were (i.) contrary to public policy; (ii.) ultra vires the Bankruptcy Act, 1914, s. 56, sub-ss. 1 and 2 (1); and (iii.) without consideration on the part of the plaintiff.

On March 28, 1939, the action was tried by Charles J., who found on the evidence that the trustee had carried on the business not only for the beneficial winding-up of the same in order that the estate should benefit in the interest of the creditors, but for another purpose, namely, to help the bankrupt in his difficulties by enabling him to continue to carry on the business, and therefore that the carrying on of the business by the trustee had not been in accordance with the Bankruptcy Act, 1914, s. 56, sub-s. 1; and he held that the guarantees being founded on illegal conduct could not be enforced, and that there must be judgment for the defendant. (2)

The plaintiff appealed.

Linton Thorp K.C. and *C. J. T. Pensotti*, for the trustee, plaintiff, appellant. The learned judge was wrong in holding that the plaintiff could not maintain an action against the defendant on the guarantees for the loss sustained by him in carrying on the business of the bankrupt. He was wrong in holding on the facts that the plaintiff as trustee carried on the business of the bankrupt otherwise than for the beneficial winding-up of the same contrary to s. 56, sub-s. 1, of the Bankruptcy Act, 1914 (1), and, therefore, that the

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(1) Bankruptcy Act, 1914, s. 56: "The trustee may, with the permission of the committee of inspection, do all or any of the following things:—(1.) Carry on "the business of the bankrupt, so far as may be necessary for the beneficial winding up of the same; (2.) bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt; . . . ."

Sect. 79: "(1.) Subject to the provisions of this Act, the trustee shall, in the administration of the property of the bankrupt and in the distribution thereof amongst his creditors, have regard to any directions that may be given by resolution of the creditors at any general meeting, or by the committee of inspection, and any directions so given by the creditors at any general meeting shall, in case of conflict, be deemed to override any directions given by the committee of inspection."

(2) Material portions of the evidence and of the judgment of Charles J. are set out below in the judgment of Slesser L.J.

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contract, being founded on illegal conduct could not be enforced. The plaintiff in fact carried on the business with a view to the beneficial winding-up thereof. Even if the plaintiff did carry on the business in part for some purpose other than the beneficial winding-up thereof, the fact that, in performing his part of the contract between himself and the defendant, he committed a breach of the Bankruptcy Act, affords the defendant no defence to an action by the plaintiff on the guarantees: *Lee* v. *Sangster* (1); and *In re Branson. Ex parte the Trustee.* (2)

[DU PARCQ L.J. referred to *Ex parte Emmanuel. In re Batey.* (3)]

Harold J. Brown, for the guarantor, defendant, respondent. Charles J. rightly held that the plaintiff as trustee could not maintain this action against the defendant on the guarantees. There are three particular grounds on which the guarantees cannot be enforced by the plaintiff against the defendant. First, the contract of which the guarantee formed part was ultra vires the powers of the plaintiff as trustee. The trustee in bankruptcy owes his very existence as such to, and derives all his powers from, the bankruptcy legislation. His only right to carry on the business of the bankrupt is that conferred upon him by s. 56, sub-s. 1, of the Bankruptcy Act, 1914, namely, with the permission of the committee of inspection to carry on that business so far as may be necessary for the beneficial winding-up of the same. He has no power to carry on that business either wholly or in part for any other purpose, and therefore the contract between him and the defendant under which he engaged to carry on that business for, or partly for, the benefit of the bankrupt or the defendant was illegal and void. Where the debtor is adjudicated bankrupt all his property vests in the trustee for the purpose of being divided among the creditors and for no other purpose: see Williams on Bankruptcy, 15th ed., p. 101. Secondly, the contract is against the public policy of the Bankruptcy Acts. Under

(1) (1857) 2 C. B. (N. S.) 1.
(2) [1914] 2 K. B. 701.
(3) 17 Ch. D. 35.

these Acts it is in the public interest that the estate of the bankrupt should be wound up and the bankrupt discharged as soon as reasonably possible. If the trustee could carry on the business for purposes other than its beneficial winding-up, there would be a danger of his refusing favourable offers to purchase the business, and continuing to carry it on at a loss in the hope that it might perhaps become prosperous. The trustee owes a fiduciary duty to the creditors to wind up the estate for their benefit, and he should not contract with third parties to carry on the bankrupt's business in the interest of such parties. Thirdly, there was no valuable consideration on the part of the plaintiff to support the contract. The consideration which he purported to give was a promise to pursue the illegal course of carrying on the business of the bankrupt for a purpose not authorized by the Bankruptcy Act, namely, for the benefit of the bankrupt and the defendant, and that being an illegal consideration was no consideration to support the contract.

Linton Thorp K.C. in reply. It was not ultra vires on the part of the plaintiff as trustee to enter into the contract with the defendant of which the guarantees formed part. He made the contract and carried on the business thereunder with the permission of the committee of inspection under s. 56 of the Act, and under their directions in accordance with s. 79. In these circumstances he was not only entitled but bound to carry on the business. The contract and the carrying on of the business were not void as against public policy. They were matters not of public but of domestic concern. So far from being against, they were in accordance with public policy, because it was believed that if the trustee carried on the business it might prosper and render the estate solvent and capable of paying the creditors in full. The contract was not void as having been made without consideration on the part of the plaintiff inasmuch as he undertook to give time and attention to the management of the business, and rendered himself personally liable for goods supplied to it. Assuming that the carrying on of the business by the plaintiff as trustee was illegal, the only persons who could complain of its illegality were the creditors,

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but they made no complaint. This case is distinguishable from *Ex parte Emmanuel. In re Batey.* (1)

SLESSER L.J. In this case an action was brought by Mr. L. C. Clark, who was at the material times trustee in bankruptcy of Mr. W. T. James, against Mrs. A. M. Smith, on two guarantees, the later of which is dated January 12, 1938, the amount due on the guarantees being admittedly 138*l.* 15*s.* 3*d.*

The material facts of the case are these: [His Lordship stated the facts as above set out and, after remarking that the language of the earlier guarantee was not now material and nothing turned upon it, continued:]

It is said, now that the guarantee is sought to be enforced, that in fact the evidence shows that this business was being carried on contrary to the Bankruptcy Act, 1914, s. 56, which provides: "The trustee may, with the permission of the "committee of inspection, do all or any of the following "things: (1.) Carry on the business of the bankrupt, so far "as may be necessary for the beneficial winding-up of the "same." Charles J., the learned judge who tried the case, in his judgment has come to the conclusion that the business was not being carried on by the trustee as required by that sub-section. He says: "The only question is whether the "conduct of the trustee in bankruptcy is so irregular as to "force me to the conclusion that he was not carrying on the "business for the beneficial winding-up of the business." Then: "I have no doubt from his own evidence that he "(the trustee) was intervening for another purpose. He was "involved with Mrs. Smith, who came and told him over and "over again that the only purpose of her guarantee was that "James"—that is the bankrupt—"should be able to go on "in that business, not that the estate should benefit, not that "there should be a beneficial winding-up of the estate. 200*l.* "was offered and the trustee in bankruptcy could have accepted "it. Instead of that, I find upon the evidence that at the "behest of Mrs. Smith he was in fact influenced and biased in "the action which he took in carrying on this business by, as

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(1) 17 Ch. D. 35.

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"he has sworn to me, his desire to help Mr. James in his "difficulties." The evidence in my judgment amply supports the conclusion at which the learned judge arrived. It is not necessary, I think, here to consider that part of the history of the case which showed how Mrs. Smith orally withdrew her guarantee and then orally again renewed it. It is, however, clear to my mind that Mr. Clark, although he said in cross-examination that what he did was solely for the purpose of the beneficial winding-up of the business, did in fact accept the guarantee and agree to carry on the business for other purposes. For instance, he said that " Mrs. Smith was a friend "of Mr. James, and so long as the business continued Mr. "James would be manager of it, and consequently would "have a job." " I explained to her that it was extremely "improbable that it could make any profit during the winter." Then he said : " The position was rather this, that I could "carry on the business if I had a guarantee, and if the "committee approved." "I asked her into my private "office, and she said that she wished the guarantee to "remain, or rather, that she wished the business to be "carried on." And finally : " Mrs. Smith explained that she "had seen Mr. James, and they had kept it open ; and in "view of the continuance of the guarantee, I was quite "agreeable to that." There are other passages which to my mind support the conclusion of the learned judge that this business, though no doubt in part it was carried on for what was conceived to be the ultimate benefit of the creditors, was in part carried on at the request of Mrs. Smith to assist Mr. James, and also in order that the business might go on generally.

Another reason why I have come to the conclusion that the learned judge was right is afforded by the case of *Ex parte Emmanuel. In re Batey.* (1) In that case, according to the headnote of the report, it was held that : " The creditors of a "bankrupt trader have no power to authorize the trustee to "carry on the business of the bankrupt, except so far as may "be necessary for the beneficial winding-up of the business."

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(1) 17 Ch. D. 35.

In that case, as appears more particularly from the judgment of Cotton L.J. (1), the creditors who had passed a resolution authorizing the trustees to carry on the business for such further period or periods from time to time as the creditors in general meeting shall determine, had as their object " to make "a profit from carrying on the business during the drinking "season of the year." The Lord Justice continued: " As the "Act does not give any power to use the assets in such a "speculation, it is our duty to say that the resolutions are "ultra vires, and that they cannot stand." James L.J. (2), having quoted the resolution which I have just mentioned, went on to say that that had the effect of giving the creditors "power to determine from time to time indefinitely how long "the business should be carried on."

When the language of the resolution in the present case of December 9, 1937, which I have already referred to, is read, that also appears to me a resolution involving that the committee of inspection will decide from time to time how long the business is to be carried on. It is not to be carried on for such time as would be necessary for the purpose of a beneficial winding-up—it is to be carried on for the present. I therefore come to the conclusion that it is impossible to disturb the finding of the learned judge, that the conduct of the trustee in carrying on this business was contrary to the provisions of s. 56, sub-s. 1, of the Bankruptcy Act, 1914.

That being so, it is argued that as a consequence of that this guarantee cannot be enforced, being, as the learned judge appears to find, a guarantee based upon an illegal act. I find myself unable to agree with the learned judge in that conclusion. I will assume that this business was carried on otherwise than in accordance with the provisions of s. 56, sub-s. 1, of the Bankruptcy Act, which I have read. But what is the consequence of that? The legal effects, not perhaps so much this particular sub-section as of sub-s. 2 (which provides that the trustee may bring or defend an action relating to the property), have been considered in two cases, which seem to indicate that any objection to the carrying on

(1) 17 Ch. D. 35, 43. (2) Ibid. 39.

of the business of the bankrupt, except so far as may be necessary for the beneficial winding-up of the same, could only be taken to be on the basis that the provision offended against was for the protection of the estate. In the case of *In re Branson* (1) the decision is based upon words similar to those of sub-s. 2, which are contained in the Bankruptcy Act, 1883, and were that the trustee must obtain the sanction of the committee of inspection before bringing, instituting or defending legal proceedings. In that case it was decided that those provisions were for the protection of the estate as between the trustee and the estate, and afforded no defence to any proceeding which the trustee, without such sanction, might institute against other parties. That case followed the case of *Lee* v. *Sangster* (2), where an action at law was brought by the assignee in bankruptcy without first obtaining the leave of the Court of Bankruptcy contrary to the Bankruptcy Consolidation Act, 1849 (12 & 13 Vict. c. 106), s. 153, which provided that the assignees could only, with the leave of the Court first obtained, upon application to such Court but not otherwise, "commence, prosecute or defend any "action at law," and it was held that the absence of such leave afforded no defence to the action. Williams J., in giving the judgment of the Court, said: "It was contended "that the right of the assignees to sue, being a thing created "by the Act alone, must be taken with the qualification "annexed to it by the Act, namely, that they shall not have "the right to sue, unless they shall have obtained the leave "of the court of bankruptcy." Then the learned judge proceeded: "On consideration, however, we are satisfied that "the statute intended to make the obtaining of the requisite "leave a matter only between the assignees and the court of "bankruptcy, and not at all between the assignees and the "other party to the suit."

Finally on this head the case to which I have already referred of *Ex parte Emmanuel. In re Batey* (3) appears to me to indicate that it is only upon motion of the persons interested in

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(1) [1914] 2 K. B. 701.
(2) 2 C. B. (N. S.) 1.
(3) 17 Ch. D. 35.

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the estate that resolutions which offend against s. 56, sub-s. 1, being as I have said for the benefit of the estate, can be impeached and held to be invalid. In other words, as against the world, the carrying on of the business by the trustee can create legal relations between him and third parties, either as debtor or creditor, incurred in the carrying on of the business, notwithstanding that it is carried on otherwise than solely for the beneficial winding-up of the estate.

This case seems to me to be entirely different from that of a company, which, as a corporation, has power only to do certain acts under its memorandum, articles or otherwise, purporting to make other contracts ultra vires. The reference to ultra vires by Cotton L.J. in *Ex parte Emmanuel. In re Batey* (1) seems to me only to relate to matters as between persons interested in the disposal of the estate.

In this particular case what has happened is that this guarantee, as I read it, has been given without qualification by Mrs. Smith "in consideration of your carrying on the "business hitherto carried on by W. T. James." I cannot see why those words, being entirely unqualified, can here be said to constitute a guarantee which is not enforceable, by reason of the fact merely that it may be that some creditor might have complained of the continued carrying on of the business. The carrying on of the business was continued. The loss contemplated in the guarantee was incurred. All the conditions of the guarantee seem to me to have been satisfied, and the liability to be complete.

Once that conclusion is arrived at, which I think is supported by the authorities, it follows that it cannot be said that this contract or the carrying-on of the business thereunder is illegal in the sense in which the learned judge has used the word. I do not think it can be said that it is void as being ultra vires, because the trustee is in my opinion competent to carry on the business and to create legal liabilities as between himself and third persons with whom he deals in carrying on the business, whether he does or does not do so for the purpose of the beneficial winding-up of the estate. Nor do I think that it is void as being contrary to public policy. Nor do I think it can be said that there was no consideration moving from the trustee in this matter. Mrs. Smith, on her part, with the object of assisting in the carrying on of the business and of keeping Mr. James in possession of his eating-house, gave her guaranty. The trustee on his part with the same objects in view as well as that of the beneficial winding-up of the business gave his supervision to the conduct of the eating-house which might have made profits, and his doing so not being unlawful, as already stated, the consideration which he thus gave was not void on the ground of illegality. Consequently, there is consideration supporting this contract in both parties. In my opinion the learned judge was wrong, in his conclusion that it was unenforceable ; and I think that there should be judgment on the guarantees against Mrs. Smith for 138*l.* 15*s.* 3*d.*

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(1) 17 Ch. D. 35.

MacKinnon L.J. I agree. Upon the terms of the written document of January 12, 1938, signed by the defendant and addressed to Mr. Clark as trustee of the estate of Mr. W. T. James in bankruptcy, there is no doubt whatever that she is liable for the sum of 138*l.* 15*s.* 3*d.* claimed in this action. It is suggested, however, that Mr. Clark cannot enforce that patent liability against Mrs. Smith because this agreement is in some way tainted with illegality. A trustee of the estate, under s. 56 of the Bankruptcy Act, 1914, may carry on the business of the bankrupt so far as may be necessary for the beneficial winding-up of the estate. By s. 79 it is provided : "Subject to the provisions of this Act, the trustee shall, in the "administration of the property of the bankrupt . . . . "have regard to any directions that may be given by resolution "of the creditors at any general meeting, or by the committee "of inspection . . . ." On December 31, the committee of inspection decided that this business should be carried on, if Mrs. Smith would renew the guarantee she had already given to the official receiver. There cannot be the slightest doubt that the committee of inspection thought that the carrying on of the business was within the powers of Mr. Clark as trustee under s. 56; and that Mr. Clark, as trustee, thought it was within his powers under that section. It seems to me that in so thinking they made a mistake about the law applicable in such a case. If some creditor or some dissatisfied member of the committee of inspection had intervened and had applied to the Court to prevent the trustee from continuing to carry on the business on the ground that he was not carrying it on within s. 56, but was carrying it on indefinitely and not for the purposes of the beneficial winding-up of the estate, I think that on the authority of *Ex parte Emmanuel. In re Batey* (1) the creditor would probably have succeeded.

That conclusion means that Mr. Clark in carrying on the business as trustee, and the committee of inspection in resolving that it should be carried on by him, were making a venial and intelligible mistake as to an obscure branch of the law, but without any turpitude or illegality. I am at a loss to understand why, because, as between the trustee and the creditors, one of the creditors might object to the carrying on of this business by the trustee, that should afford Mrs. Smith any defence whatever to an action on the plain contract into which she had entered with the trustee. If authority be needed for that proposition, I think it is supplied by the old case of *Lee* v. *Sandford* (2) in 1857; and by *In re Branson.* (3) In each of those cases a person who had contracted with the trustee sought to set up in denial of his liability that there was some irregularity in the action of the trustee in exercising his powers under the Bankruptcy Act. In one case he had not the leave of the Court to bring the action, and in the other case the position was somewhat similar. The Courts there decided that as between the trustee and the creditors, it might be that he had acted irregularly, but that that did not afford any defence to the person who had made a clear contract with the trustee.

It seems to me, as I suggested during the course of the argument, that if, this business having been carried on in this way, a customer who had eaten a pork chop in the restaurant

(1) 17 Ch. D. 35.
(2) 2 C. B. (N S.) 1.
(3) [1914] 2 K. B. 701.

refused to pay, and when sued in the county court said that he need not pay because Mr. Clark was not properly authorized under s. 56 of the Bankruptcy Act to carry on the business and supply him with the chop, it would be quite clear that the customer would have had no defence to the action. Equally I think Mrs. Smith has no defence here to her clear liability upon the terms of the written contract into which she entered.

That being so, I agree with my Lord that this appeal should succeed.

DU PARCQ L.J. I do not dissent from the proposed order, but I am bound to say that I entertain much more doubt about the matter than the other members of the Court: and I think that I ought to explain briefly why I doubt, and why I do not dissent.

In this case I have no doubt that the learned judge was entitled to find that the trustee in bankruptcy was not carrying on the business of the bankrupt in conditions which justified his carrying it on according to the terms of s. 56, sub-s. 1, of the Bankruptcy Act, 1914. That sub-section empowers the trustee, with the permission of the committee of inspection, to carry on the business of the bankrupt "so far as may be "necessary for the beneficial winding-up of the same." I agree with what has been said already, that if a creditor had come to the Court to object to the resolution passed by the committee of inspection for the carrying on of the business by the trustee that resolution would have been rescinded. It seems to me plain enough that in passing that resolution the committee of inspection were going beyond their authority; and it follows that the trustee in bankruptcy in acting on that resolution went beyond his authority. As I understand the matter, creditors are not entitled to indulge in the speculation of carrying on the bankrupt's business in the hope that if they carry it on for some time, waiting perhaps for conditions to improve, it may be possible to carry it on at a profit. Everybody knows that, if one carries on a business hoping to make a profit, one runs the risk of carrying it on at a loss. It is not the policy of the Bankruptcy Act that insolvent businesses of bankrupts should be carried on in an attempt to get them into a better shape, or to get them out of their difficulties into a more prosperous condition.

I think that the case which has been cited of *Ex parte Emmanuel. In re Batey* (1) states the matter plainly, and puts it beyond question in this case that, to say the least of it, Mr. Clark would have had very great difficulty in justifying to the Court what he had done. So far I think we are all agreed; and I feel no doubt whatever.

Further, I have no doubt that it is very difficult sometimes, as Brett L.J., as he then was, said in *Ex parte Emmanuel. In re Batey* (1), to decide in what circumstances the Court can say that creditors have exceeded their authority. Supposing that the committee of inspection and the trustee act bona fide, and think they are carrying on the business in a manner necessary for the beneficial winding-up of the same, I do not doubt that, however wrong they may be, they will be liable for any obligations they incur. It would be absurd, and indeed would lead to fantastic consequences, as MacKinnon L.J. has just pointed out, to say that before anybody enters into a contract with the trustee he must ascertain whether the committee and trustee are right in the view they entertain that they are carrying on the business within their powers. I think, so far as that point goes, that the case of *In re Branson* (2), which I need not refer to in any detail for the moment, is an authority for saying that the question whether the trustee and the committee of inspection are right or not is one between them and the creditors. Whenever that very difficult question has to be considered, the Court must decide it. This Court cannot possibly say that obligations undertaken towards a trustee in bankruptcy, doing what he believes he has power to do, though mistakenly, need not be carried out—I am assuming a case where the whole of the facts are known to the other party—or, conversely, that he need not carry out his obligations to a person who, knowing the facts, became a creditor.

My difficulty arises on the other point which was taken by Mr. Brown, as to the legality of this arrangement. Suppose, to

(1) 17 Ch. D. 35. (2) [1914] 2 K. B. 701.

take a case somewhat different from *In re Branson* (1), that a trustee in bankruptcy had said to a third party that he knew that he (the trustee) was not entitled to bring a legal proceeding relating to the property of the bankrupt unless he got the permission of the committee of inspection, and that he knew perfectly well that the committee of inspection never would permit it, but that if the third party was prepared to promise that if the trustee did bring the proceeding without permission the third party would indemnify him in respect of the costs, then he would bring it, I feel grave doubt—I do not put it any higher—whether that contract of indemnity could be enforced, because it would be clear that the consideration, given with the knowledge of both parties, was the doing of something which the trustee had certainly no authority, and perhaps no right, to do ; and which, I think one may add, it was contrary to the policy of the law that he should do. I do not express any final opinion upon the point ; but I feel great doubt whether in such a case the indemnity could be enforced.

I am inclined to think that the facts of the present case establish that when the trustee in bankruptcy and his committee decided to carry on the business of the bankrupt they knew quite well that what they were doing was not necessary for the beneficial winding-up of the same. As to the trustee in bankruptcy, I think that if he agreed to carry on the business for a consideration, then that contract could not be enforced. I say that because it seems to me to be clear enough that, although no doubt in a sense the carrying on of the business is a domestic matter between the creditors and the trustee, still the plain policy of the Act is that these insolvent businesses should not be carried on. If a man knows that he has no power to do, and is not permitted to do, and I think I may say is forbidden by law to do, something that he is doing, and does it for a consideration, then that consideration may well be said to be an illegal consideration.

In this case the learned judge came to the conclusion, as I

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(1) [1914] 2 K. B. 701.

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understand his judgment, that the trustee in bankruptcy was, as he puts it, intervening in the business not "for the beneficial "winding-up of the same" but for another purpose altogether. The learned judge says: "He was involved with Mrs. Smith" —that is the defendant—" who came and told him over and "over again that the only purpose of her guarantee was that "James should be able to go on in that business, not that the "estate should benefit, not that there should be a beneficial "winding-up of the estate. 200*l.* was offered and the trustee "in bankruptcy could have accepted it. Instead of that, I "find upon the evidence that at the behest of Mrs. Smith he "was in fact influenced and biased in the action which he "took in carrying on this business by, as he has sworn to me, "his desire to help Mr. James in his difficulties." It is quite true, of course, that on the face of it, this guarantee is a perfectly lawful document: but there is, I think, no doubt that an agreement which is on the face of it perfectly legal in its terms, will be void if it is made for an illegal purpose. If I were completely satisfied that the purpose for which this guarantee was given was an illegal purpose, then I should dissent and say that I thought the appeal ought to be dismissed. That is a point about which I have felt a great deal of doubt. I think the carrying on of the business merely to make a profit, coupled with a desire to oblige Mrs. Smith or Mr. James, probably would be an illegal purpose, but it is not necessary that I should in these circumstances express a final opinion on the point. I am impressed by the findings of the learned judge: but it is a serious and a strong thing to say that people who may have been doing what they thought right, and may have been honestly endeavouring to carry out the Act, have been guilty of illegality; and I am necessarily impressed by the strong view taken by MacKinnon L.J., that there is nothing at all here to show that these people were not honestly trying to carry out the terms of the sub-section. It may be that they misinterpreted it, and misunderstood their duties. It may possibly be that they thought the best thing they could do for the beneficial winding-up of the estate was to carry on the business a little longer. I am not prepared to say that they are not entitled in those circumstances to take into account the fact that a guarantee had been given against loss. In other words, there is a clear distinction between saying: "You are doing something which you ought not to "do, because there is a guarantee," and, on the other hand, saying: "It may be a doubtful and delicate question whether "this is the best thing to do, but the guarantee thrown into the "scale just tilts it in favour of thinking it is the right thing to "do for the beneficial winding-up of the estate."

Having those doubts and reservations in my mind, which I have thought it proper to express, I do not dissent; and I am prepared to agree that the appeal should be allowed.

Appeal allowed.
Judgment for plaintiff for sum claimed.

Linton Thorp K.C. for the plaintiff. The Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 1, provides: "Subject to the "provisions of this section, a person shall not be entitled, "except with the leave of the appropriate Court, to proceed "to execution on, or otherwise to the enforcement of, any "judgment or order of any Court . . . ."; and the Courts (Emergency Powers) Rules, 1939, r. 9, provides: "Where "no judgment or order has been given or made, an application "under subsection (1.) or subsection (3.), for leave to proceed "may be made at the time when the judgment or order is given "or made . . . ." The Act and Rules will be found in [1939] W. N. pp. 444, seq, 476. As judgment has been given for the plaintiff by this Court an application is now made on his behalf under these provisions for leave to enforce the judgment.

Harold J. Brown for the defendant. The application should be refused. If leave be given to enforce the judgment against the defendant at present it will cause her financial embarrassment and might even mean ruination for her.

SLESSER L.J. (for the Court). The purpose of this Act is to confer powers upon the Court in relation to certain matters in connection with the war. There is here no emergency

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connected with the war, and no reason why leave should not be given by the Court to enforce its judgment under the Act.

Application granted.

Solicitors for appellant: *Lovell, Son & Pitfield, for F. J. P. Veale, Brighton.*

Solicitors for respondent: *Gordon Gardiner, Carpenter & Co., for F. H. Carpenter, Brighton.*

J. R.

ENGLISH *v.* WESTERN.

1939
Nov. 14.

Insurance—Motor-car—Third-party liability—Exclusion of "any "member of the assured's household"—Construction.

By a policy of motor-car insurance taken out by a boy of seventeen living with, and dependent on, his father it was provided that the underwriters should indemnify the assured against "all sums which the assured shall become liable to pay by way "of compensation for: *A. Injury to Persons*: Death of or bodily "injury to any person (including passengers) caused by or arising "out of the use of the car, but excluding . . . . (*b*) Death or "injury to any member of the assured's household who is being "carried in . . . . the car otherwise than by reason of or in "pursuance of a contract of employment." While the assured was driving the car, with his sister (who also lived with their father) as a passenger, an accident occurred in which a woman was killed and several persons, including his sister, were injured. The underwriters paid all claims arising out of the accident, except that in respect of the sister's injuries. They contended that she was a "member of the assured's household" and that any liability in respect of her claim was excluded by the clause above set out:—

Held, that the expression "any member of the assured's "household" meant "any member of the same household of "which the assured was a member," not "any member of a house- "hold of which the assured was the head," and that the assured's sister was a member of his household within the meaning of the exception.

ACTION in the Commercial List tried by Branson J. without a jury.

The plaintiff, Jack Kenneth English, claimed in this friendly action a declaration that he was entitled to be indemnified by the defendant, Frank Western, under an insurance policy subscribed by the defendant in respect of any compensation which the plaintiff might become legally liable to pay to George Robert English and Rita Elaine English respectively in respect of an accident which occurred on May 28, 1938, while the plaintiff was driving the motor-car insured by the policy. The parties concurred in stating the question of law arising in the action in the following case for the opinion of the Court:—

The defendant was one of the underwriters subscribing the

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"British Standard" policy and had been appointed by the underwriters to act as a representative defendant. The policy was issued in pursuance of a proposal form signed by the plaintiff and dated April 12, 1935. The period of the policy was extended from time to time and it was a valid and subsisting contract at the material date—namely, May 28, 1938.

By clause 5 of the policy it was provided that the underwriters should indemnify the assured against "all sums which "the assured shall become liable to pay by way of com-"pensation for: A.—*Injury to Persons*: Death of or bodily "injury to any person (including passengers) caused by or "arising out of the use of the car, but excluding:— . . . . "(*b*) Death or injury to any member of the assured's house-"hold who is being carried in . . . . the car otherwise than "by reason of or in pursuance of a contract of employment."

On May 28, 1938, the plaintiff was driving his motor-car at a speed of between forty and fifty miles an hour when he came into collision with another car travelling in the opposite direction and with a third car which was travelling in the same direction as the plaintiff. As a result of the collision a woman was killed, various third parties were injured and the three cars were damaged, that of the plaintiff being a total loss.

The defendant and his fellow underwriters on the "British Standard" policy had indemnified, or had agreed to indemnify, the plaintiff in respect of the loss of his car and the various third-party claims with the exception of the claim made in respect of injuries to Rita Elaine English. Rita Elaine English was being carried in the plaintiff's car otherwise than by reason of or in pursuance of a contract of employment at the time of the collisions and she received personal injuries. Both the plaintiff and Rita Elaine English were the children of George Robert English, the plaintiff having been born on February 12, 1918, and Rita Elaine English having been born on August 22, 1920. At the material time both the plaintiff and Rita Elaine English permanently resided with their father. Neither of them made any contribution to the upkeep of the home, but on the contrary both were in receipt of allowances from their father.

By a writ of summons dated March 3, 1939, Rita Elaine English by George Robert English (her father and next friend) and George Robert English brought an action against the present plaintiff, Jack Kenneth English, for damages for injury caused by his negligent driving. Judgment was signed in default ot appearance, but the assessment of damages had been postponed by agreement pending the determination of this action.

The defendant contended that he was not liable to indemnify the plaintiff in respect of any compensation which the plaintiff might become legally liable to pay to George Robert English and Rita Elaine English respectively for the personal injuries received by Rita Elaine English by reason of the operation of clause 5A (*b*) of the policy.

The question for the opinion of the Court was whether Rita Elaine English was a member of the assured's household within the meaning of clause 5A (*b*) of the policy.

B. L. A. O'Malley (for *N. A. J. Cohen* on war service) and *J. H. C. Goldie* for the plaintiff. There is no authority, and the case is one of first impression as to the meaning of the word "household." If the plaintiff (who was seventeen when the policy was first issued) had been asked " Are you a householder ? " he must have answered " No." If asked : "Where is your household ? " his answer must have been "I have no household ; I live in my father's household." A man's household means the household which he controls or of which he is the head. Some words are admittedly used in a wider sense. A man's club, or his college, or his Inn of Court, means a society of which he is a member, not one of which he is the head. But the phrase " a man's "household " is not normally so used. The defendant's construction would mean that if a person went to stay for a week-end in a friend's house it would become his household.

C. N. Shawcross for the defendant. There is really only one reasonable view of this clause, namely, that it excludes all persons who are members of the household of which the assured is a member. [He referred to a number of dictionary definitions of "household," including (inter alia) "A family "living together" (Dr. Johnson, ed. 1827); "inmates of a "house collectively: an organised family including servants" (Oxford English Dictionary).] In Proverbs xxxi., 27, it is said: "She looketh well to the ways of her household, and eateth not "the bread of idleness." That was long before the Married Women's Property Act and a woman could not have been the head of "her" household in those days. The Court may consider the business reason for the clause. Apart from the fact that members of the household are likely to be very frequently in the car, and therefore to increase the risk unduly, there is also the possibility—though it admittedly does not arise in this case—of collusive claims by members of the same family.

BRANSON J. The question to be decided is whether on the true construction of clause 5A (*b*) in the policy Rita Elaine English was a member of the assured's household or not. I think, as has been said in argument, that the question largely turns on the way in which the language used strikes one when one first reads the words. Approaching it from that point of view, I have come to the conclusion that the underwriters' contention is correct. I think that the words "member of the "assured's household" mean a member of the same household as that of which the assured is a member, just as one speaks of a member of a man's college, or a member of a man's club. The words are completely apt to cover that construction. Indeed, to my mind, they seem more apt to cover that construction than any other. One can see some reason for a limitation so framed, but it is very difficult to follow the reason for a limitation such as that which the assured seeks to put on the words. It is reasonable to exclude from the benefits of a policy of this kind members of the assured's household, giving that word a meaning rather wider than that of "family," because it must be envisaged by the underwriters that the members of a household in that sense would probably be very frequently at risk in the car and would, therefore, be people who, if they were to be covered, would normally be covered only for some additional premium. Another reason, not for one moment suggested to be operative in a case like the present, is that members of the same household might perhaps be expected to bring forward collusive claims if they were hurt in an accident, throwing the blame on the assured that they might be able to recover, not from the assured, but from the assured's insurers. That, I think, is a reasonable fear. I am told that it operated with those who were settling this particular type of policy, and it gives an intelligible reason for the use of the language in the policy. I have come to the conclusion that the view taken by the underwriters is correct.

Perhaps it is as well, as they have had their effect on my mind, to refer to the dictionary definitions of "household" which have been cited before me. Without reading them all, I have a list here of seven or eight, in all of which the word "household" is said to be used to signify "a family living "together," "those who dwell under the same roof and compose "a family," "inmates of a house collectively," and so forth. In no case does the dictionary confine the use of the word to people who are under the domestic governance of the paterfamilias or somebody in loco parentis.

The result is that I answer the question put to me, whether Rita Elaine English was a member of the assured's household within the meaning of clause 5A (*b*) of the policy issued by the defendant to the plaintiff by saying that in my opinion she was, and is, therefore, excluded by the clause from benefit under the policy.

Judgment for defendant.

Solicitors for plaintiff: *Edward Betteley, Smith & Stirling.*
Solicitors for defendant: *William Charles Crocker.*

J. W. H.

1939
Oct. 30, 31;
Nov. 1.

TOOKE *v.* BENNETT (T. W.) AND COMPANY, LIMITED.

Moneylenders—Contract—Note or memorandum in writing—Reference to bill of sale attached—Onerous conditions in bill of sale set out in memorandum—Two documents to be read together—Valid memorandum—Moneylenders Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *s.* 6.

A document which purported to be a memorandum in writing of a moneylending contract under s. 6 of the Moneylenders Act, 1927, stated the amount of the principal advance, the amount and the rate of the interest, and, as the security, " bill of sale "dated May 26, 1938 (as per copy attached), value 35*l*." A copy of the bill of sale was in fact attached to the memorandum which also stated that " the events specified as causes of seizure in "s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882," —which were referred to in the bill of sale—" are as appears on "the back hereof." On the back of the document were set out paras. (1.) to (5.) of s. 7 of the Act of 1882, and also a clause by which the borrower undertook to keep insured the chattels which were the subject of the bill of sale :—

Held, that the memorandum and the bill of sale could be read together to constitute a good memorandum under s. 6 of the Moneylenders Act, 1927.

ACTION tried by Lewis J. without a jury.

Between 1929 and 1938 a series of loan transactions took place between the plaintiff, as borrower, and the defendants, who were registered moneylenders, the last transaction, the date of which was May 26, 1938, being a loan of 35*l*., 28*l*. 15*s*. 4*d*. of which was applied to a repayment by the plaintiff of the balance outstanding on a previous loan made on November 25, 1937.

The purported memorandum of the contract, dated May 26, 1938, under s. 6 of the Moneylenders Act, 1927 (1), was as follows :—

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(1) By Moneylenders Act, 1927, s. 6: " (1.) No contract for the "repayment by a borrower of "money lent to him . . . . by a "moneylender . . . . or for the "payment by him of interest on "money so lent and no security "given by the borrower . . . . in "respect of any such contract "shall be enforceable, unless a note "or memorandum in writing of "the contract be made and signed "personally by the borrower ". . . .

"(2.) The note or memorandum "aforesaid shall contain all the

"Principal Advance. 35*l*. being as to 28*l*. 15*s*. 4*d*. outstanding under a bill of sale dated November 25, 1937, of "which the undersigned [the plaintiff] was the grantor and "the sum of 6*l*. 4*s*. 8*d*. now handed the undersigned.

"Interest. 14*l*. 6*s*.

"Rate. 40 per cent. per annum, i.e., 8*d*. per £ per month "on the outstanding balance of principal. Amount payable "for strictly regular monthly payments of 2*l*. 6*s*. 8*d*. will be "49*l*. 6*s*. commencing the 26th proximo.

"Security. Bill of sale dated May 26, 1938 (as per copy "attached), value 35*l*. and the events specified as causes of "seizure in s. 7 of the Bills of Sale Act (1878) Amendment "Act, 1882, are as appears on the back hereof."

This memorandum was signed by the plaintiff, who acknowledged its receipt, and it was duly witnessed. On the back of the document were set out the contents of paras. (1.) to (5.) of s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, and also a clause by which the plaintiff undertook during the continuance of the security to "keep the said "chattels and things insured against loss or damage by fire "in the sum of 100*l*. at the least in some office to be approved "of by the grantees and on failure by the grantor the grantees "can insure and demand from the grantor all moneys in "respect thereof." The bill of sale was in the statutory form (see Bills of Sale Act (1878) Amendment Act, 1882, s. 9, Sched.).

The plaintiff brought the present action claiming from the defendants (inter alia) a declaration that the contracts in respect of the transactions between her and the defendants and the bills of sale entered into in respect thereof were void and unenforceable. The defendants denied the allegations made by the plaintiff.

"terms of the contract, and in "particular shall show the date on "which the loan is made, the "amount of the principal of the "loan, and, either the interest "charged on the loan expressed in "terms of a rate per cent. per "annum, or the rate per cent. per "annum represented by the interest charged as calculated in "accordance with the provisions "of the First Schedule to this "Act."

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TOOKE v. BENNETT (T. W.) & Co.

Castle-Miller for the plaintiff.

Hallis for the defendants.

Cur. adv. vult.

1939. Nov. 1. LEWIS J. The first matter which I have to consider is whether or not these transactions were unenforceable owing to the fact, as alleged, that the memorandum did not set out all the terms of the contract. In my view, it is impossible to treat all these transactions as one transaction. The first transaction was paid off promptly, and there was a lull between the first and second transactions of about a year. There was then a second transaction, with two renewals, and that was all paid off in October, 1934. Then, in August, 1935, after a period of nearly a year, the plaintiff again went to the moneylenders. It seems to me that those transactions fall to be treated in three different groups—the first transaction in May, 1929; the next three transactions which were closed in October, 1934; and then the remaining five transactions which, up to date, have not been closed.

It is said that all the terms of the contract are not contained in the memorandum. I have not seen the memorandum in all the cases, but I have before me the memorandum of contract, which purports to record, under s. 6 of the Moneylenders Act, 1927, the transaction of May 26, 1938, the last of the renewals.

[His Lordship read the document and continued :] On that piece of paper, therefore, which is headed "Memorandum of Contract," there is set out a stipulation regarding insurance, and also the matters which are referred to in the bill of sale itself where it says: "Provided always that the chattels "hereby assigned shall not be liable to seizure or to be taken "possession of by the grantees for any cause other than those "specified in s. 7 of the Bills of Sale Act (1878) Amendment "Act, 1882." The moneylenders were careful to set out in the memorandum in quite plain terms what those causes were.

I have been referred to *Westrup* v. *Equitable Investment Co.* (1), which was decided by Branson J.; a case which came before me very shortly afterwards, namely, *Stewart-Naylor* v. *London and Westminster Loan and Discount Co.* (1); and *Mitchener* v. *Equitable Investment Co.* (2), which was decided by Lawrence J., reference being there made to the cases tried by Branson J. and myself. As I understand those decisions they are that where a memorandum makes no reference whatever to the causes of seizure specified in the Bills of Sale Act (1878) Amendment Act, 1882, it does not contain the whole of the terms of the contract.

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(1) Unrep. Nov. 12, 1937.

In my view, those cases are not directly in point here. What is said in this case is that you cannot have a memorandum in two documents, and great reliance is placed on the dicta of Scrutton L.J. in *Reading Trust, Ld.* v. *Spero.* (3) In that case Scrutton L.J. appears to have left open the question whether or not a memorandum can be contained in two documents. (4) Greer L.J., however, in the same case, was of the opinion that a memorandum could be contained in two documents. (5)

It was argued by counsel for the plaintiff in the present case that it is not possible to have a memorandum contained in two documents if the bill of sale, which is the second of the two documents, contains an onerous condition. I do not accede to that argument. Where a memorandum of agreement not only refers to the bill of sale, giving the date and the value of the bill of sale, but also sets out in terms the causes of seizure referred to in the bill of sale and says that a copy of the bill of sale is attached to the memorandum, and the bill of sale is in fact attached to the memorandum, it seems to me that the contention that the two documents cannot be read together is not valid. In my view, the memorandum and the bill of sale in the present case are one document, and the bill of sale clearly sets out the clause which gives rise to the point at issue, namely, the clause which says: "The grantor doth further agree and declare that she "will duly pay to the grantees the principal sum aforesaid

(1) Unrep. Dec. 20, 1937.
(2) [1938] 2 K. B. 559.
(3) [1930] 1 K. B. 492.
(4) [1930] 1 K. B. 492, 505.
(5) Ibid. 507.

"together with the interest then due by equal monthly "payments of 2*l.* 6*s.* 8*d.* on the 26th day of June next, and "the like sum of 2*l.* 6*s.* 8*d.* on the 26th day of each and every "succeeding month until the said principal sum together "with the interest then due shall be fully paid and that in "default of payment of any instalment she will pay interest "at the rate aforesaid from the date when such instalment "shall so fall into arrear until payment thereof upon such "part of the said instalment as if such instalment had been "punctually paid would have been applicable in reduction "of the said principal sum." It is said that that clause makes her pay a further 40 per cent. on any default in payment of the instalments. It, undoubtedly, is an onerous clause, but for the reasons which I have given, the contention that it does not appear in the memorandum, in the circumstances of this case, is not sound.

That disposes of the point as to the memorandum of the contract not being valid. There still remains the question whether or not the defendants did not charge an excessive rate of interest, and that is a question which raises some difficulty. [His Lordship reviewed the evidence, reduced the rate of interest in the second and third series of transactions, and ordered an account to be taken between the parties.]

Order for account.

Solicitors for plaintiff: *Humphrey Razzall & Co.*
Solicitors for defendants: *Webster Butcher & Sons.*

G. F. L. B.

HERSCHTAL *v.* STEWART AND ARDERN, LIMITED.

1939
Oct. 20, 23.

Negligence—Defective article supplied for use—Reconditioned motor-car —Opportunity for examination—Examination not reasonably anticipated—Proximate relationship—Liability of suppliers.

The defendants supplied for the plaintiff's use a reconditioned motor-car, which was delivered at the plaintiff's flat on the afternoon or evening of July 11, 1938. Early on the following morning the plaintiff drove the car out on business. In turning a corner the near rear wheel came off, owing to the negligence of the defendants' servants before delivery and the plaintiff suffered injury :—

Held, that the defendants owed a duty to the plaintiff to take reasonable care that the car, which was intended, as they knew, for his immediate use, should be in a safe condition, and that they were liable for negligence.

Where an article supplied is known to be required for immediate use, the test of liability in an action for negligence causing a defect in the article is not whether the injured party had an opportunity for intermediate examination of the article, but whether such an examination could reasonably be anticipated by the persons supplying it, who will be liable if no such reasonable anticipation existed.

Principle in *Donoghue* v. *Stevenson* [1932] A. C. 562 applied. Statement of the law by Lord Atkin at pp. 580–582 and 599, considered.

The principle laid down in *Donoghue* v. *Stevenson* [1932] A. C. 562 applies not only to manufacturers, but also to suppliers or repairers of goods.

ACTION before Tucker J.

The plaintiff claimed damages for personal injuries, the result of an accident, which he alleged was due to the negligence of the defendants in reconditioning a used motor-car which they had supplied to Utility Products, Ld., for the plaintiff's use on hire-purchase terms.

Alternative grounds of claim were (*a*) breach of warranty, and (*b*) breach of statutory duty contrary to the Road Traffic Act, 1934, s. 8, and the Motor Vehicles (Construction and Use) Regulations, 1937, s. 67 (No. 229 of Statutory Rules and Orders).

The plaintiff was a director of a company called Utility Products, Ld., and the defendants were motor-car engineers and distributors. The defendants had agreed to supply to

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ARDERN, LD.

Utility Products, Ld., a reconditioned Morris car upon hire-purchase terms. The defendants duly supplied a car of this description to a finance company, S. and A. Services, Ld., which hired it out to Utility Products, Ld. In the afternoon or evening of July 11, 1938, the plaintiff took delivery of the car on behalf of the company, and a servant of the defendants drove him to his (the plaintiff's) flat, a distance of two or three miles from the defendant's shop. The plaintiff then signed a receipt for it, stating that it was in good condition and "seen, tried and approved." The car was left outside the flat and next morning, at 7 A.M., the plaintiff took it out on business. After driving a few miles he was turning a corner when the near rear wheel came off, and he received a nervous shock, and in consequence had to incur medical and other expenses.

The evidence for the plaintiff showed, from an examination of the wheel and hub just after the accident, that the nuts had not been properly tightened for some time, and that the threads were stripped. The defence, so far as here material, was that the plaintiff had an opportunity, and that in these circumstances the defendants owed him no duty, to inspect and adjust the wheel before using the car. Alternatively, it was pleaded that the defendants did not put the car on the road, and had reasonable cause to believe that the car would not be used until the plaintiff had inspected and adjusted it.

R. E. Borneman for the plaintiff. The defendants were negligent in reconditioning the car and that was the cause of the damage. It is a case of res ipsa loquitur. The defendants are liable to the plaintiff for breach of duty in supplying a vehicle in a dangerous state knowing that it was for his immediate use: *Donoghue* v. *Stevenson.* (1) *Earl* v. *Lubbock* (2), appears to be an adverse decision, but if it were heard to-day the decision would be different. There the plaintiff's case rested upon negligence in the performance of a contract between the defendants and the plaintiff's employers. The words "seen, tried and approved" in the receipt form signed by the present plaintiff only affect the contract of sale, and there was no contract between the plaintiff and the defendants. For the same reason the plaintiff does not seek to rely on the claim for breach of warranty. In support of the claim in tort he cited *Malfroot* v. *Noxal, Ld.* (1); *Kubach* v. *Hollands* (2); and *Grant* v. *Australian Knitting Mills, Ld.* (3)

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(1) [1932] A. C. 562.

(2) [1905] 1 K. B. 253.

Gilbert Beyfus K.C. and *W. H. Moresby* for the defendants. There was a considerable interval of time between the delivery of the car and the accident, and the plaintiff had a reasonable opportunity to examine the car and discover the defect. That excludes the case from the principle of liability laid down in *Donoghue* v. *Stevenson.* (4) For it ends the "proximate "relationship" (to quote from Lord Atkin's judgment in that case), "which may be too remote where inspection, even "of the person using, certainly of an intermediate person, "may reasonably be interposed." The defendants are only liable where there is "no reasonable possibility of intermediate "examination." *Farr* v. *Butters Brothers & Co.* (5), also supports this view. *Earl* v. *Lubbock* (6) governs the present case and this decision is to be preferred to the more recent cases cited by the plaintiff. But among the latter *Dransfield* v. *British Insulated Cables, Ld.* (7), is in our favour. There Hawke J. held that the defendants were excused from liability because of the opportunity of intermediate examination. The mere breach of statutory duty (Road Traffic Act, 1934, s. 8) does not give the plaintiff a ground of action unless a duty was owed him by the defendants and negligence is proved: *Phillips* v. *Britannia Hygienic Laundry Co.* (8)

Borneman in reply. Neither in *Donoghue* v. *Stevenson* (4), nor in *Farr* v. *Butters Brothers & Co.* (5), did the question arise whether the defendants could have anticipated an intermediate examination. It is not enough that there should be an opportunity for such an examination for the relationship between the parties to be broken. It must be shown that an examination or inspection was reasonably anticipated by the defendants. In a case where the article, as here, is intended for immediate use, the parties can have anticipated no such thing. To limit the application of *Donoghue* v. *Stevenson* (1) in the manner proposed by the defendants would be too narrow an interpretation of the decision and would be contrary to the principles there enunciated.

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(1) (1935) 51 Times L. R. 551.
(2) (1937) 53 Times L. R. 1024.
(3) [1936] A. C. 85.
(4) [1932] A. C. 562, 582, 599.
(5) [1932] 2 K. B. 606.
(6) [1905] 1 K. B. 253.
(7) (1937) 54 Times L. R. 11.
(8) [1923] 1 K. B. 539.

TUCKER J. [after stating the facts, continued :] It is clear that the claim for breach of warranty must fail, because there was no contract between the defendants and the plaintiff, and Mr. Borneman very early in the case abandoned that branch of the claim. For similar reasons I do not think the defendants can place any reliance on the form of receipt which was signed by the plaintiff on behalf of Utility Products, Ld., when he signed it as being in good condition and "as "seen, tried and approved." It cannot protect the defendants from a claim founded in negligence by the plaintiff, provided that he can establish that the defendants owed him a duty and that they had been negligent in the performance of that duty.

Mr. Borneman, for the plaintiff, put his case in two ways with regard to negligence. He had included in his claim a claim based upon breach of a statutory duty under s. 8 of the Road Traffic Act, 1934, and s. 67 of the Motor Vehicles (Construction and Use) Regulations, 1937. In his argument he conceded that, unless there was negligence, he could not rely solely on the breach of statutory duty. He did put forward an argument that s. 8 of the Act of 1934, and these Regulations, would assist his case in some way, coupled with an allegation of negligence, if he substantiated the allegation of negligence, but I have failed to appreciate that part of Mr. Borneman's argument. If he can establish negligence, which presupposes the existence of a duty by the defendants to the plaintiff, he is entitled to succeed, and his case cannot be made worse or better by coupling with that part of his claim an allegation

(1) [1932] A. C. 562.

that there has been a breach of this regulation or section. If, on the other hand, there is no duty owed, then he would be thrown back upon this section and these Regulations, and in that event he concedes that he cannot succeed in view of the decision in *Phillips* v. *Britannia Hygienic Laundry Co.* (1) In my view this case rests upon the question of negligence alone, that is to say, the sole question is whether the plaintiff can bring this case within the four corners of the decision of the House of Lords in *Donoghue* v. *Stevenson.* (2)

Before dealing with that case and other cases which have been decided subsequently, I should say that I am satisfied that if any duty was owed in law by the defendants to the plaintiff, then on the facts here there has clearly been a breach of that duty and negligence has been established. The facts which I have described have not been contradicted by any evidence called by the defendants, and it followed from the evidence called by the plaintiff that this wheel must either have been fixed in a negligent way or there had been negligent failure properly to overhaul the car in the process of reconditioning. I think that the facts really speak for themselves and it must follow that there was negligence somewhere in the defendants' servants. I am also satisfied that when the defendants supplied the car to the plaintiff, the last thing they contemplated was that there was ever going to be any such intermediate examination of it by the plaintiff or by anybody else as would be likely to reveal a defect of this kind before the next morning. On the other hand, there did exist opportunity if anybody had desired to make such an examination. Totally different considerations would arise in the case of an accident happening after a lapse of weeks or months or after the car had been driven a considerable mileage. That is not the case with which I have to deal.

Put shortly, therefore, the real issue in the case is this: Is the proper test here whether there was an opportunity for an intermediate examination, or is the test whether any intermediate examination could reasonably be anticipated by the defendants? If the defendants are excused from that

(1) [1923] 1 K. B. 539. (2) [1932] A. C. 562.

liability by the mere fact that an intermediate examination could have taken place, then on the facts of this case they should succeed, but if, on the other hand, I hold that they could not and would not reasonably anticipate an intermediate examination, then the plaintiff is entitled to succeed.

When one looks at *Donoghue* v. *Stevenson* (1), one has to remember that it is the principle laid down by the case that one should observe, and any actual words used which were not strictly applicable to the facts and the discussion there should not limit the interpretation to be put upon that principle. The statement of the law by Lord Atkin and Lord Macmillan has been so often referred to that I need only read the general proposition of Lord Atkin, where he said (1): " You must take reasonable care to avoid acts or "omissions which you can reasonably foresee would be likely "to injure your neighbour. Who, then, in law is my neigh-"bour ? The answer seems to be—persons who are so closely "and directly affected by my act that I ought reasonably to "have them in contemplation as being so affected when I am "directing my mind to the acts or omissions which are called "in question." That is not intended to be an exhaustive definition and has to be interpreted in the light of the facts to which Lord Atkin was referring. When he is referring to circumstances in which one man becomes the neighbour of another man so as to owe him a duty, he quotes what Lord Esher (then Brett M.R.) had said in *Heaven* v. *Pender* (2), as to the cases in which there would or would not be liability. "This," said Lord Esher (referring to the rule he had just formulated), "would exclude a case in which the goods are supplied under "circumstances in which it would be a chance by whom they "would be used or whether they would be used or not, or "whether they would be used before there would probably be "means of observing any defect, or where the goods would "be of such a nature that a want of care or skill as to their "condition or the manner of supplying them would not "probably produce danger of injury to person or property." Then Lord Atkin goes on : " I draw particular attention to

(1) [1932] A. C. 562, 580, 581, 582.

(2) (1883) 11 Q. B. D. 503, 510.

"the fact that Lord Esher emphasises the necessity of goods "having to be 'used immediately' and 'used at once before "'a reasonable opportunity of inspection' . . . . This is "obviously to exclude the possibility of goods having their "condition altered by lapse of time, and to call attention to "the proximate relationship, which may be too remote where "inspection even of the person using, certainly of an intermediate person, may reasonably be interposed . . . . With "this necessary qualification of proximate relationship . . . . "I think the judgment of Lord Esher expresses the law of "England." Then, in the last paragraph of his speech (1): "If your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the "proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to "show that he intends them to reach the ultimate consumer "in the form in which they left him with no reasonable "possibility of intermediate examination, and with the "knowledge that the absence of reasonable care in the "preparation or putting up of the products will result in an "injury to the consumer's life or property, owes a duty to "the consumer to take that reasonable care."

It is to be observed that when Lord Atkin quoted from Lord Esher with approval, the phrase he referred to was "used at once before a reasonable opportunity of inspection," and when he quotes those words with approval, in dealing with the proximate relationship, he went on to use the words "which may be too remote where inspection, even of the "person using, certainly of an intermediate person, may "reasonably be interposed." That is a slightly different phrase from "reasonable opportunity for inspection," and in the concluding part of his speech he speaks of no reasonable possibility of intermediate examination.

In *Donoghue* v. *Stevenson* (1) it was not necessary for the House of Lords to decide whether the test of liability was the existence of a reasonable possibility of intermediate examination or a reasonable anticipation of such examination on the part of the defendants. The matter did not arise. It was obvious on the face of the case, an opaque ginger beer bottle put on the market by the defendants, that there would not be any intermediate examination, nor would the defendants have ever supposed that there would be. It was not, therefore, in the least necessary for any of their Lordships to apply their minds to the distinction which might arise in other cases. They were laying down the general principle about liability. They were pointing out the necessity for the existence of this proximate relationship and referring to the way in which the chain might be broken. In the particular case before them the principle they were enunciating was only expressed to apply to the manufacturer of goods. It has in subsequent cases been held to cover also the case of people who were not manufacturers, but were suppliers or repairers of goods.

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(1) [1932] A. C. 562, 582, 599.

I need not read from the speech of Lord Macmillan. In the well known passage which has been read to me by Mr. Beyfus (1), he states the position as he found it. It is my duty to endeavour to ascertain the principle laid down in that case. I do not find it helpful to take the literal words used by Lord Atkin in one passage, "no reasonable possibility of "intermediate examination," and to say that, because he used those words in a case where it was not necessary to distinguish between opportunity for examination and reasonable anticipation that examination would take place, one should regard those words as exhaustive. That would be putting too narrow an interpretation on the decision in that case. I feel fortified in that view by reference to what Greer L.J. said in *Farr* v. *Butters Brothers & Co.* (2) It seems to me clear that the plaintiff there could not possibly have succeeded, because the man, who lost his life, had in fact discovered the existence of the defect before he suffered his injury. In that case *Donoghue* v. *Stevenson* (1) was discussed and considered by the learned Lords Justices, and it is to be observed particularly that Scrutton L.J. seems to have taken the view that *Donoghue* v. *Stevenson* (1) proceeded on the

(1) [1932] A. C. 562.

(2) [1932] 2 K. B. 606, 619, 620.

basis of the absence of opportunity of examination. But, once again, it was not necessary for the decision in *Farr* v. *Butters Brothers & Co.* (1), that the Court should come to a conclusion on that point, because in any event the claim could not have been brought within the four corners of *Donoghue* v. *Stevenson.* (2) In considering the danger of taking isolated sentences in a judgment and building on them, it is helpful to see how Greer L.J. put it in his judgment. He said: "As I read the judgment of the House of Lords, the fact that "in that case the defect was not discoverable by such a "reasonable examination as ought to be anticipated dis-"tinguishes the case from this one." There he is carefully stating the way in which he reads the decision of the House of Lords, and he is describing it as being based on the defect not being discoverable by such reasonable examination as ought to be anticipated. Having used those words on one page, on the next page he says, after quoting Lord Atkin, "That is the principle on which he based his judgment. I "understood him to mean that if the manufacturer had left "a reasonable possibility of examination, either through "an intermediate person or by its use, there would be no "liability, because there would be no duty." So there in succeeding pages he is putting the decision in two different ways. In one case he is basing it on the possibility of intermediate examination and in the other he is speaking of the defect not being discoverable by a reasonable examination that ought to be anticipated. That is just the point which I have to decide in this case. It shows, to my mind, how dangerous it is to fasten on a sentence of that kind in this judgment, and similarly in the speech of Lord Atkin, when the framer was not applying his mind to the precise question. In this case I have to decide which of the two ways of stating the decision expressed by Greer L.J. in *Farr* v. *Butters Brothers & Co.* (1) was right.

There have been one or two decisions by Courts of first instance that assist this matter. First of all, I should refer to a decision of Lewis J. in *Malfroot* v. *Noxal, Ld.* (1) In that case the male plaintiff was the owner of a motor cycle to which a few days previously the defendants had fitted a sidecar. He was driving the combination along a public road and the sidecar became detached from the motor cycle. Both the male plaintiff and the female plaintiff, who was the passenger in the sidecar, sustained personal injuries, and it was held " that the defendants were guilty of negligence in "fitting the sidecar to the motor cycle, that they were liable "to the male plaintiff in contract and in tort, and to the "female plaintiff in tort." *Donoghue* v. *Stevenson* (2) was considered. In the statement of facts it appears that in May, 1934, the defendant fitted a sidecar to Mr. Syer's motor cycle, and on May 20, while Mr. Syer was driving the combination, with Mrs. Malfroot as a passenger in the sidecar, the sidecar came away from the motor cycle and both the plaintiffs were injured. Lewis J., in giving judgment, said that the case was extremely difficult, that he was satisfied that the male plaintiff had a claim for breach of warranty, and that, on the authority of *Donoghue* v. *Stevenson* (2), the defendant owed a duty to the passenger in the sidecar. According to the report, Lewis J. is stated to have said that "he adopted the words of Lord Macmillan " which are therein set out. When one looks at the report of *Donoghue* v. *Stevenson* (2), it appears that the words quoted by Lewis J. were not Lord Macmillan's own words, but were a quotation by him from the judgment of Cardozo J. in the American case *MacPherson* v. *Buick Motor Co.* (3), which Lord Macmillan set out as part of the history of these cases, without saying whether or not he expressly approved of it. Lewis J. went on to say that in his view the sidecar was to be used " without "new tests " and he found that it was not properly fitted. There Lewis J. was not invited to distinguish between opportunity for examination and reasonable expectation that there would be an examination, but he deals with the matter by the phrase that the sidecar was to be used " without

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(1) [1932] 2 K. B. 606, 619, 620.

(2) [1932] A. C. 562.

(1) 51 Times L. R. 551.
(2) [1932] A. C. 562.
(3) (1916) 217 N. Y. 382.

"new tests." Although he was not applying his mind, apparently, to the possible distinction, I think it must have been a case in which there would have been opportunity for intermediate examination, and I cannot help thinking that, although Lewis J. was not applying his mind to the distinction, his words are more consistent with there having been no reasonable anticipation that there would be examination than with his taking the view that there was no opportunity for such an examination. The case, however, is one in which the learned judge found that the principle of *Donoghue* v. *Stevenson* (1) applies to the repairer of an article and is not confined solely to the manufacturer.

Then there is a recent decision of Branson J. in *Stennett* v. *Hancock.* (2) That was also a case of repair. The owner of a motor lorry took the wheel of the lorry, the flange of which had come off, to a motor repairer, with instructions to re-assemble it. The repairer's assistants re-assembled it and replaced it on the lorry, and the lorry owner's servant drove the lorry away. An hour or two later, the flange came off while the lorry was being driven on the highway by the lorry owner's servant, and, bowling along the road, it mounted the pavement and hit the female plaintiff, injuring her. There was no evidence that anything had happened between the time when the lorry was taken out of the garage and the time of the accident which might have caused the wheel to become dislodged. It was held that: (i.), following *Phillips* v. *Britannia Hygienic Laundry Co.* (3), the lorry owner having entrusted the repair of the lorry to a competent repairer, he was not liable for either negligence or nuisance to a person who suffered injury on the road by reason of the competent repairer having been negligent; (ii.) the lorry owner, or the person who was going to take the vehicle on the road, was not under a duty to ascertain for himself, in so far as his capabilities allowed him to do so, whether the competent repairer had competently repaired the lorry; (iii.) following *Donoghue* v. *Stevenson* (1) and distinguishing *Earl* v. *Lubbock* (1), the repairer was liable to the person who suffered injury on the road as a result of his negligence, as he was in the same position as that of the manufacturer of an article sold by a distributor in circumstances which prevented the distributor or ultimate purchaser or consumer from discovering by inspection any defect in the article. On the facts of that case as set out in the judgment of Branson J. it appears that there was a dispute whether the lorry had been driven directly from the garage to the place where the accident happened, or whether, before it got there, it had been driven round the town for an hour or so. In the view of Branson J. that was immaterial. It would appear, therefore, that this was a case where it was possible that the owner of the lorry might have examined the wheel after the repair had been carried out before putting the vehicle on the road. There was nothing to prevent him doing so, but it was not to be anticipated by any reasonable person that he would do any such thing. In giving judgment on that part of the case Branson J. said: "I then come "to discuss the position in regard to the defendant Peters." He refers to *Donoghue* v. *Stevenson* (2), and he summarizes his view of that case by saying: "In that case, the manu-"facturer of an article which was sold by him to a distributor, "in circumstances which prevented the distributor or the "ultimate purchaser or consumer from discovering by inspection "any defect in the article, was held to be under a legal duty "to the ultimate purchaser or consumer to take reasonable "care that the article was free from defect likely to cause "injury." He puts it, therefore, as being "in circumstances "which prevented the distributor or the ultimate purchaser "from discovering by inspection." There again, he must have been using words which could not have been taken quite literally, because there was nothing which the repairers did in *Stennett* v. *Hancock* (3) which would have prevented the owner of the lorry from discovering any defects by inspection, but he does go on to say that the repairers knew that the lorry was being repaired to be used on the road and that, if it was not repaired with due care, in all probability somebody would be injured. The learned judge also states that they knew the second defendant was not going to take the wheel off or submit it to any scrutiny to see whether the work had been properly done. I think that sentence probably meant no more than that they knew that the second defendant could not reasonably be expected to examine the wheel or to submit it to any scrutiny. There may have been some evidence that the second defendant was not going to examine the wheel, or stated that he was not, but I can find no trace of that in the case, and I think the words are more likely to mean that the repairers could not reasonably expect that the second defendant was going to make any examination. The learned judge goes on to explain his reasons for finding the repairers liable, and he distinguishes the case from *Earl* v. *Lubbock.* (1)

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(1) [1932] A. C. 562.
(2) [1939] 2 All E. R. 578, 582.
(3) [1923] 1 K. B. 539.

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(1) [1905] 1 K. B. 253.
(2) [1932] A. C. 562.
(3) [1939] 2 All E. R. 578.

Those two cases show the view taken by Lewis J. and by Branson J., and I respectfully agree that the decision in *Donoghue* v. *Stevenson* (2) is not intended to be limited only to manufacturers of goods but that it applies in a proper case to the repairer of an article, subject to the question which I have to decide as to the intermediate examination. I do not think, as I have said, that either of those two cases deals expressly with the points with which I have to deal. The point only arises inferentially in that in both those cases there must have existed the possibility of intermediate examination, though in neither case do I think that the defendant could reasonably have anticipated that there would be such intermediate examination.

The two cases which throw some light on the matter which I have to decide are, in my view, *Kubach* v. *Hollands* (3) and *Dransfield* v. *British Insulated Cables, Ld.* (4) In *Kubach* v. *Hollands* (3) a little girl had been injured during a science class at a school by the explosion of some chemicals, which had been improperly compounded. She brought the action

(1) [1905] 1 K. B. 253.
(2) [1932] A. C. 562.
(3) 53 Times L. R. 1024.
(4) 54 Times L. R. 11.

against the headmistress of the school for breach of contract and negligence and against the retail chemist who supplied the school with those chemicals. Against the headmistress the action failed on the ground that there had been no breach of contract or negligence, because it could not be expected that the headmistress would analyse, or cause to be analysed or inspected, chemicals which she purchased from reputable chemists, although there had been an interval of time during which it would have been perfectly possible for her to have caused an examination or an analysis of the powders to be made. The claim succeeded against the chemists on the basis of *Donoghue* v. *Stevenson* (1); that is to say, because, although they were not manufacturers, they were people who had put on the market goods which had become dangerous owing to their mixture and they were liable to a third party who was injured thereby. But it is to be observed that there was ample intervening opportunity for examination between the time of the supply of the chemicals by the chemists to the headmistress. None the less, although that point does not appear to have been discussed (and according to my personal recollection of the case it was not discussed), the whole case proceeded on the basis that the chemists were liable if they had been careless: *Donoghue* v. *Stevenson.* (1) I think that, if Lord Hewart C.J. had taken a different view of *Donoghue* v. *Stevenson* (1), he would never have allowed the case against the chemists to go to the jury.

This case is reported on that part of it in which the retail chemists claimed over by way of third-party proceedings against the wholesale chemists who had supplied them with the chemicals, and, in giving his judgment, the Lord Chief Justice only deals with the main claim by the plaintiff against the first two defendants as part of the history of the matter. In considering the case as between the second defendants and the third parties, the Lord Chief Justice did have to consider *Donoghue* v. *Stevenson* (1), but he does not expressly give any opinion with regard to the applicability of *Donoghue* v. *Stevenson* (1) as between the plaintiffs and the second

(1) [1932] A. C. 562.

defendants. That had been disposed of some days earlier before a jury. If the Lord Chief Justice had thought that the existence of opportunity of examination by the headmistress had broken the chain or nexus between the retail chemists and the little girl sufficiently to exclude them from liability, he could never have left the case to go to the jury, but nobody could reasonably have expected the headmistress to make such an examination, and the retail chemists, no doubt, could not have reasonably thought that any such intermediate examination would take place. On that view of the case, the decision is quite easy to follow and understand.

As against that, we have *Dransfield* v. *British Insulated Cables, Ld.* (1), where Hawke J. had to decide the very point whether the test was the opportunity for examination or the reasonable anticipation that examination would take place. Having considered *Donoghue* v. *Stevenson* (2) and the more recent cases, he came to the conclusion that the proper view was that the defendants were excused from liability because there was an opportunity of intermediate examination of the bull ring by the corporation before user by their employee and tests could have been made by the corporation which would have disclosed the defect. In that case the bull ring, which was held to have been negligently made by the defendants, had been in the possession of the Bournemouth Corporation for some twelve months before the accident, and the corporation had in their possession certain implements which would have been suitable for testing it, but nobody suggested that the defendants or the reputable makers of these bull rings would in fact have expected the corporation to make any test. The learned judge came to the conclusion that the existence of the possibility of intermediate examination broke the chain, or prevented the existence of that proximity which would impose a duty on the defendants. In giving judgment he said: " It was submitted that certain "more recent cases: *Brown* v. *T. & E. C. Cotterill* (3); "*Malfroot* v. *Noxall, Ld.* (4), and *Kubach* v. *Hollands* (5) in

(1) 54 Times L. R. 11.
(2) [1932] A. C. 562.
(3) (1934) 51 Times L. R. 21.
(4) 51 Times L. R. 551.
(5) 53 Times L. R. 1024.

"some way showed that the decision in *Donoghue* v. *Stevenson* (1) had been modified so as to show that Mr. Tucker's "contention was right in law. If those cases are inconsistent "with my view of *Donoghue* v. *Stevenson* (1) I must not accept "them. I must decide this case on my view of what *Donoghue* "v. *Stevenson* (1) decides."

It seems to me that I have in the present case to do exactly what Hawke J. had to do in *Dransfield* v. *British Insulated Cables, Ld.* (2), that is to say, taking all the assistance that I can obtain from subsequent decisions, I have to apply my view of the decision in *Donoghue* v. *Stevenson* (1) to the facts of the case before me. Frankly, I find it difficult to reconcile the results of *Dransfield* v. *British Insulated Cables, Ld.* (2) with *Kubach* v. *Hollands* (3), because in *Kubach* v. *Hollands* (3) there was ample opportunity for intermediate examination in the same way as there was in *Dransfield* v. *British Insulated Cables, Ld.* (2), but in neither case would any reasonable person have expected an intermediate examination to take place before the accident in question. I prefer what I think was essential to the result of *Kubach* v. *Hollands* (3), that is to say, that the mere existence of the opportunity for examination is not sufficient to break the chain or destroy the proximate relationship. I think that *Donoghue* v. *Stevenson* (1) ought not to be so limited as to be confined only to the precise words used by Lord Atkin in the concluding part of his speech, which I have already pointed out were not necessary for the decision in that case. I think that one has to look at the whole basis of the judgment and apply it to the facts.

In the present case, in my view, the defendants were the plaintiff's neighbour in law within the definition of Lord Atkin. I think that they were very immediate neighbours. They were supplying a dangerous article to a person with whom they were in actual contact. He was not some ultimate person or user who might have been envisaged. He was an actual man with whom they were dealing in the flesh. They were supplying his company through him with a dangerous vehicle, knowing that it was going to be used forthwith by him. In my view, there was a very close proximity or relationship existing between the plaintiff and the defendants, which imposed a duty on the defendants to take reasonable care to see that the article which they were delivering to the plaintiff, knowing that he was going immediately to put it on the road, was not in a condition whereby a wheel might rapidly fly off, causing possibly very severe and grave damage.

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(1) [1932] A. C. 562.
(2) 54 Times L. R. 11.
(3) 53 Times L. R. 1024.

In reviewing the cases, there is one to which I have not referred, and that is *Grant* v. *Australian Knitting Mills* (1), which came before the Privy Council. It will be remembered that there a man had bought some underpants from retailers, as a result of wearing which he suffered some illness and he sued the manufacturer. There was some discussion whether there had or had not been some intervening facts which would preclude the defendants from liability in any event, for it was clear that the plaintiff might have washed the pants before wearing them and that thereby the defendants might have been absolved from liability. It was even suggested that he had been guilty of negligence in not so doing. In considering that case in relation to the present matter it is to be observed that on those facts—namely, that the pants might have been washed before user—that was a case where, although intermediate examination could not perhaps have taken place or could not have been said to be reasonable, at any rate, ample opportunity existed for something to happen which would have resulted either in the discovery of the defect or prevention of the injury. When one looks at *Grant* v. *Australian Knitting Mills* (1), it tends to support my view that it would be putting a narrow interpretation on *Donoghue* v. *Stevenson* (2) to say that it only applies where there can be no possible intermediate examination. The whole trend of *Grant* v. *Australian Knitting Mills* (1) is contrary to that very limited view of *Donoghue* v. *Stevenson.* (2) In *Grant* v. *Australian Knitting Mills* (1) the defect could no more be seen by the naked eye than apparently the snail could be

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(1) [1936] A. C. 85.

(2) [1932] A. C. 562.

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seen in the opaque ginger beer bottle, but there was no difficulty in applying to the pants a process which would not have destroyed them but which would have prevented the accident happening. None the less, the defendants were held to be liable.

Accordingly, I hold that the defendants are liable in the present case on the basis that they were the plaintiff's neighbours in law and were supplying a dangerous article for his user in circumstances in which they did not and could not have reasonably anticipated that there would be any such intermediate examination as would be likely to reveal a defect such as existed in the article.

[His Lordship then dealt with the amount of the damages to which the plaintiff was entitled, and assessed them at a total of 88*l.* 5*s.*, for which sum he gave judgment.]

Judgment for plaintiff.

Solicitors for plaintiff: *Oscar Mason & Co.*
Solicitors for defendants: *Goulden, Mesquita & Co.*

F. P. F.

HOLLOWAY *v.* POPLAR CORPORATION.

1939
Oct. 24, 26.

[1938. H. 3664.]

Local Government—Officers—Superannuation—Gratuity to employee on retirement—Resolution for payment by instalments—Validity—Poplar Borough Council (Superannuation and Pensions) Act, 1911 (1 *&* 2 *Geo.* 5, *c. cii.*), *s.* 8, *sub-s.* 2.

By a local Act a borough council was empowered in certain circumstances to "grant to an officer a gratuity not exceeding "twice the amount of his salary or wages and emoluments during "the year ending on the quarter day which immediately precedes "the day on which he ceases to hold his office or employment." The council resolved that a gratuity of 268*l.* 16*s.* 10*d.* be granted to the plaintiff, who had retired from their employment, and that the distribution thereof be at the rate of 10*s.* per week. After a number of weekly payments had been made, the plaintiff brought an action claiming the whole balance, alleging that so much of the resolution as prescribed payment by instalments was ultra vires:—

Held, that the Act merely empowered the council to make a gratuitous payment, but conferred no legal right on the plaintiff in respect thereof; and that, even if the plaintiff had had any enforceable right, the direction for payment by instalments was intra vires.

Marchant v. *Lee Conservancy Board* (1873) L. R. 8 Ex. 290; and in Exchequer Chamber L. R. 9 Ex. 60 considered.

ACTION tried by Asquith J.

The plaintiff, Thomas Holloway, was employed by the Poplar Corporation as a lavatory attendant. Before he became entitled to a superannuation allowance he retired owing to ill-health.

On June 23, 1938, the Poplar Borough Council resolved under s. 8, sub-s. 2, of the Poplar Borough Council (Superannuation and Pensions) Act, 1911 (1), that a gratuity of 268*l.* 16*s.* 10*d.* be granted out of the general rate fund to him and that the distribution thereof be at the rate of 10s. per week, provided that in the event of his death before the total amount of the gratuity was paid, particulars of any dependants of the plaintiff should be reported to the defendants' finance committee for their consideration and direction. Weekly instalments to a total of 9*l.* 10*s.* were paid to the plaintiff under this resolution. He then brought an action claiming 259*l.* 6*s.* 10*d.*, the balance of the gratuity.

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(1) The Poplar Borough Council (Superannuation and Pensions) Act, 1911 (1 & 2 Geo. 5, c. cii.), s. 8, sub-s. 1: "An officer who "has not become entitled to a "superannuation allowance and "who—(*a*) voluntarily resigns his "office or employment; or (*b*) "loses his office or employment "by reason of a reduction of staff "or of any alteration of areas or "boundaries; or (*c*) otherwise "ceases to hold his office or employment by reason of bodily "injury not occasioned by his "own default or of any other "cause whatever other than his "own misconduct; shall be entitled

Caplan for the plaintiff. There are two points: (1.) Does the Act confer any right of action at all on a person who has a resolution in his favour? (2.) Is there any power in the council to attach a condition to the grant of a gratuity?

As to (1.), when a corporation of this character resolves to make a grant, it constitutes itself a trustee of the amount of the grant. That is why in some cases of this type the point has not been taken that no right of action exists. There is no direct authority, but *Marchant* v. *Lee Conservancy Board* (1) is inferentially in the plaintiff's favour. In that case a voluntary allowance made by the defendant board was subsequently reduced, and the plaintiff brought an action claiming the larger amount, and succeeded in the court of first instance. The Exchequer Chamber reversed that decision, but not on the ground that no action lay, which, if it had been sound, would have been the simplest way to dispose of the action, but on the question whether the reduction was intra vires.

As to (2.) the plaintiff complains of the words of the resolution from "and that the distribution thereof" to the end. The sub-section clearly contemplates a lump sum, not weekly payments, for it provides for the calculation of a maximum,

"to receive a sum equal to the "amount of all his contributions "under this Act."

Sub-s. 2: "In any such case "of loss of office or employment "as in this section mentioned the "council may also if they see fit "grant to an officer a gratuity not "exceeding twice the amount of "his salary or wages and emoluments during the year ending "on the quarter day which immediately precedes the day on "which he ceases to hold his "office or employment but every "such gratuity shall be paid out "of the general rate and not out "of the superannuation fund."

(1) (1873) L. R. 8 Ex. 290; Exch. Cham. L. R. 9 Ex. 60.

and that is a lump sum. Under a local and private Act, the powers of the corporation do not go further than is expressly authorized. Unless a power to pay by instalments follows by necessary implication from the words used, it is excluded. It would have been easy to include such a power, but it was omitted.

Turner K.C. and *Bidder* (for *T. G. Talbot* on war service) for the defendants. Sect. 8, sub-s. 2, confers a power on the council, but no right on the individual officer, as is done by sub-s. 1. The resolution of the council, therefore, confers no right on the plaintiff, and the action is entirely misconceived. It is evident from the judgment in the Exchequer Chamber in *Marchant* v. *Lee Conservancy Board* (1) that the Court held that the plaintiff there had no right of action, and the case does not warrant the inference sought to be drawn by the plaintiff.

As to the second point, the resolution is intra vires. The Interpretation Act, 1889, provides that singular words include the plural (s. 1) and that any power may be exercised from time to time (s. 32, sub-s. 1). In any case, the resolution is not severable, and if any part is ultra vires, the whole is, and the plaintiff would get nothing. It could only be severable if it were clear that the defendants would have passed the first part without the second. He referred to Craies on Statutes, 4th ed., pp. 486–7, citing *Scottish Drainage and Improvement Co.* v. *Campbell* (2), and to *Purfleet U. D. C.* v. *Minister of Health.* (3)

Caplan in reply. A statute prohibits that which it does not authorize. The resolution is severable. If a body does something which it is entitled to do and adds something which it is not entitled to add, then that which is valid remains without the invalid addition. The resolution operates as a grant, but I am bound by *Marchant* v. *Lee Conservancy Board* (4) to admit that it is a revocable grant.

Cur. adv. vult.

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(1) (1874) L. R. 9 Ex. 60, 63.
(2) (1889) 14 App. Cas. 139.
(3) [1935] W. N. 184; 105 L. J. (K. B.) 44.
(4) L. R. 8 Ex. 290; Exch. Cham. L. R. 9 Ex. 60.

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1939. Oct. 26. ASQUITH J. read a judgment, in which, after setting out the facts and the terms of the section and resolution, he said: The plaintiff's claim necessarily implies that under s. 8, sub-s. 2, not only are the defendants empowered to grant gratuities out of the general rate, but the grantee acquires, once the necessary resolution is passed, a legal right to proceed against them for payment thereof. If the plaintiff succeeds in this, he must go further and show that the defendants have not satisfied their obligations by paying the 10*s.* weekly in accordance with their resolution, but were bound in the first instance to pay the gratuity in a lump sum and are still bound to pay the balance in that form. To succeed in this argument he has to show that such parts, and such parts only, of the resolution as provide for payment in ten shilling instalments are ultra vires s. 8, sub-s. 2. If the resolution were bad as a whole, he could have no claim.

Accordingly, he seeks to show that the resolution, so far as it provides that a gratuity of 268*l.* 16*s.* 10*d.* be granted out of the general rate to the plaintiff is intra vires, but that the succeeding words "that the distribution thereof be at the "rate of 10*s.* a week" are ultra vires, and that these parts of the resolution are mutually severable.

The first point is whether the sub-section confers any legal rights on the person to whom the defendants resolve that a gratuity shall be paid under it, or whether it merely empowers the defendants to pay a gratuity out of the general rate, without imposing on them any obligation. There must be many clauses in local and private Acts worded substantially as s. 8, sub-s. 2, is, but counsel could not cite to me, nor could I discover, any direct authority on the point in question.

It is clear that there is no contract, if only because there is no consideration. The only authority cited by either counsel as having even an indirect bearing on the present case was *Marchant* v. *Lee Conservancy Board.* (1) In that case the board was empowered by the Lee River Navigation

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(1) L. R. 8 Ex. 290; Exch. Cham. L. R. 9 Ex. 60.

Act, 1850, s. 76, "from time to time to pay to any servant "whose services may no longer be required such annuity or "other allowance as might in the judgment of the trustees "be reasonable and proper . . . . out of moneys which "might come into their hands . . . ." The trustees, under that section, by resolution granted to a retiring servant an annuity of 300*l.* per annum. The board subsequently passed a resolution reducing the amount by half, and paid 37*l.* 10*s.* only for the next quarter. The plaintiff sued for the balance. The Court of first instance held that the annuity originally granted could not be reduced in amount. On appeal, the Exchequer Chamber reversed this decision, holding that the trustees were entitled to reduce the amount.

The argument centred mainly on the validity or otherwise of the reducing resolution. The Court decided that it was intra vires and the reduction effective. The inference drawn from this by counsel for the plaintiff in the present case is that the Court there assumed that the section conferred rights on the plaintiff, otherwise they would have said "it matters "not whether the second resolution was intra vires; the "plaintiff never had a legal right to his annuity; the "defendants could at any time not only reduce but abolish it." This is admitted to be but an oblique inference from the language of the Court of Exchequer Chamber, but it is noteworthy that Keating J. did say in the course of his judgment (1) "it is argued indeed that the resolution was binding as a "grant . . . . but from that construction [of s. 76 of the "Act in question] I entirely dissent; it conferred a power "upon them [the Board] but it imposed no obligation." Keating J. goes on to say that there was no consideration and no contract: "The resolution conferred a mere bounty "on the plaintiff; the elements of a contract are entirely "wanting."

The Court held that the section in that case imposed no obligation on the defendants, in other words, gave the plaintiff no legal right to the annuity. I think the same holds good of the sub-section involved in the present case, and that the case cited is an authority against the plaintiff. The resolution is not a grant, nor does it make or evidence a contract. It imposes no obligation on the defendants. It merely empowers them to do what they could not otherwise have done—draw on the general rate for a specified purpose.

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(1) L. R. 9 Ex. 63.

If I am right in this, it disposes of the whole claim. If I am wrong, the question arises whether the plaintiff's construction of s. 8, sub-s. 2, can be maintained. He contended that it confers no power to provide that any gratuity granted shall be payable by instalments. In support of this submission he argues, first, that to grant a gratuity so payable is to grant several gratuities, whereas the sub-section speaks of "a" gratuity, meaning a single sum payable once and for all. The provision in the Interpretation Act, 1889, that singular words include the plural is, I think, a sufficient answer to this point, though, in my view, a gratuity payable in instalments is not several gratuities. A cake, eaten in slices, does not become several cakes.

Secondly, he argues that because the maximum which a gratuity must not exceed is expressed in terms of a lump sum, and not in terms of a weekly or other periodical sum, the gratuity itself must be payable in a lump sum, and not in weekly or other periodical payments. This seems to me a non sequitur.

Lastly, under this head the plaintiff says that a private or local Act prohibits that which it does not expressly or by necessary implication authorize, and that it does not expressly or by necessary implication authorize payment of a gratuity in instalments. Hence, it is said that that part of the resolution which provides for payment in instalments is ultra vires, and the resolution should be read without it. Whether or not the rule of construction relied on be correctly stated, it has, I think no application to the issue I am considering, since I should read "gratuity" as wide enough to cover any money gratuitously granted or paid, whether it is paid in one sum or in instalments. Even if the argument were sound, the plaintiff might have difficulty in establishing that the two limbs of the resolution are severable.

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For these reasons the claim, though ingeniously argued, must be dismissed with costs.

Judgment for defendants.

Solicitors for plaintiff: *Kenneth Duthie & Co.*
Solicitor for defendants: *W. H. Thompson.*

J. W. H.

C. A.

1939
Oct. 9.

SELWOOD *v.* TOWNLEY COAL AND FIRECLAY COMPANY, LIMITED.

Workmen's compensation—Injury to workman—Money paid by employers to workman and accepted by him as compensation under the Workmen's Compensation Act—No claim for compensation made by workman—Claim to recover damages at common law for the same injury—Claim barred—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 29, *sub-s.* 1.

The plaintiff was injured by an accident arising out of and in the course of his employment. While he was in hospital his employers sent to him each week money representing half his wages, which was sent to him as compensation under the Workmen's Compensation Act, 1925. This money he received and accepted as compensation under the Act although he had never made a claim for compensation under the Act. Subsequently, on the advice of a solicitor, he refused to accept any more weekly payments, and then brought an action at common law to recover damages for personal injuries:—

Held, that, as the workman had been paid compensation, known to be such, under the Workmen's Compensation Act, even although he had made no claim for compensation, he was precluded under s. 29, sub-s. 1, of the Workmen's Compensation Act from also recovering damages from his employers at common law in respect of his injuries.

Perkins v. *Hugh Stevenson & Sons, Ld.*, ante p. 56, followed and applied.

APPEAL from a decision of Croom-Johnson J., sitting with a common jury at the Manchester Assizes.

The plaintiff, who was a miner in the employ of the defendants, was seriously injured as the result of an accident in the colliery belonging to the defendants in which he worked. He was taken to hospital. While he was in hospital somebody on behalf of his employers, the defendants, sent money to him each week, which he apparently received in the hospital and handed over to his wife. This money he received well knowing and understanding that it was sent to him by his employers as representing half his wages, based on the average of the twelve months preceding the accident, and that the money was sent to him as compensation under the Workmen's Compensation Act. About the end of July, 1938, and while the plaintiff was gravely incapacitated, he stopped taking those weekly payments, and sent his wife to the colliery to say that he did not want any more compensation. That was because his solicitor told him so to do.

The plaintiff subsequently brought an action at common law for personal injuries. At the trial the plaintiff was asked by the learned judge: " Did you know that these payments "which you had been receiving up to then were being paid to "you under the Workmen's Compensation Act ? " and the plaintiff's answer was: " I understood so, sir." The jury awarded him 3086*l.* 5*s.* 6*d.* as damages.

The defendants appealed. The appeal was heard on October 9, 1939.

F. A. Sellers K.C. and *Ivan Horniman* for the appellants. It was not competent for these damages to be awarded to the plaintiff by reason of s. 29 of the Workmen's Compensation Act, 1925 (1), as the plaintiff has already received compensation under the Act: *Perkins* v. *Hugh Stevenson & Sons, Ld.* (2)

Maxwell Fyfe K.C. and *C. N. Shawcross* for the respondent. *Perkins* v. *Hugh Stevenson & Sons, Ld.* (2), is distinguishable because in that case the workman had made a claim for compensation although he did not know what the effect of the claim for compensation would be on his rights at common law, whereas in the present case the employers brought the money to the workman in the first instance without his having made a claim, and the workman accepted it by way of compensation. This case is not covered by *Perkins'* case (2), because that case only applies where the workman has made a claim and the employers pay compensation under that claim. Here the workman did not make a claim, but the employers offered

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(1) Workmen's Compensation Act, 1925, s. 29, sub-s. 1, provides: "When the injury was "caused by the personal negligence "or wilful act of the employer or "of some person for whose act or "default the employer is responsible, nothing in this Act shall "affect any civil liability of the "employer, but in that case the "workman may, at his option, "either claim compensation under "this Act or take proceedings "independently of this Act; but "the employer shall not be liable "to pay compensation for injury "to a workman by accident arising "out of and in the course of the "employment both independently "of and also under this Act. ". . . ."

(2) Ante p. 56.

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money which the workman accepted as compensation. There is a vital difference between accepting compensating without making a claim and the acceptance by the workman of compensation after making a claim. In the present case the jury have found that there was no election by the workman and the judge has held that there was no agreement by the workman to accept the money as compensation. A workman must have present to his mind his right to elect before he can be said to have exercised his option to elect. In the present case the workman did not know that he had an option to elect to claim damages at common law, and therefore there was no valid election by the workman to accept compensation under the Act and not to claim damages at common law. A payment under an agreement which is not a valid agreement is in no different position from a gift.

SLESSER L.J. In this case judgment has been given against the employers of a miner who was seriously injured as the result of an accident in a colliery, the details of which it is not necessary here to discuss; but the jury in assessing the damages gave him 3086*l.* 5*s.* 6*d.*, which considerable sum indicates their view of the gravity of the injuries which he had sustained. The employers, however, take on this appeal a preliminary objection, apart from other matters which they might have urged against the damages which were awarded in this case, that it was not competent for those damages to be awarded by reason of s. 29 of the Workmen's Compensation Act, 1925. Sub-s. 1 of that section provides: "When "the injury was caused by the personal negligence or wilful "act of the employer or of some person for whose act or default "the employer is responsible, nothing in this Act shall affect "any civil liability of the employer, but in that case the "workman may, at his option, either claim compensation "under this Act or take proceedings independently of this "Act; but the employer shall not be liable to pay compensation "for injury to a workman by accident arising out of and in "the course of the employment both independently of and "also under this Act."

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In the present case the learned judge tells us in his judgment that whilst this unfortunate man was in hospital "somebody "on behalf of his employers, the defendants, sent money to "him each week, which he apparently received in the hospital "and handed over to his wife. This money he received "well knowing and understanding that it was sent to him by "his employers as representing half his wages based on the "average of the twelve months preceding the accident, and that "the money was sent to him as compensation under the "Workmen's Compensation Act. At some time in or about "the month of July, 1938, somewhere after the 22nd of that "month, when the plaintiff was still gravely incapacitated, "he stopped taking these weekly payments and sent his wife "to the colliery to say that he did not want any more com-"pensation. That was because his solicitor told him so to do, "or as he puts it, 'Our solicitor informed us that we were to " 'cease drawing this money'." In the evidence which was given by the plaintiff, he was asked by the learned judge: "Did you know that these payments which you had been "receiving up to then were being paid to you under the "Workmen's Compensation Act?" and the answer was: "I understood so, sir." It is quite clear on the evidence and on the finding of the learned judge that this man was paid the compensation by the employers in respect of this accident and accepted the compensation upon the basis that it was compensation under the Workmen's Compensation Act.

Now there has been in this Court, since the judgment of Croom-Johnson J. in the case in which appeal is here brought, a decision in the case of *Perkins* v. *Hugh Stevenson & Sons, Ld.* (1) In that case a man who had applied for and had been paid compensation under the Workmen's Compensation Act until October, 1938 (by which date he had recovered from his injuries), similarly sought to claim damages for negligence and breach of statutory duty, and it was there contended that by reason of the fact that he had received compensation after making a claim for it he had barred any further claim at common law in accordance with s. 29 of the Act. As

(1) Ante p. 56.

was pointed out by the learned Master of the Rolls (1) the workman in that case said: " 'At the time when I made that " 'claim and received those payments I knew nothing about " 'my option under the sub-section, and, therefore, it cannot " 'be said that I exercised that option at all. The first part " 'of the sub-section, therefore, does not affect me' ": but the learned Master of the Rolls came to the conclusion that notwithstanding that the workman did not know that the effect of his claim would result in barring his right of action at common law, yet at the same time the effect of the statute was to preclude him from proceeding successfully at common law. He said this (2): "The effect of the second limb of the section "is to exempt the employer from liability to pay compensation, "both under the Act and outside the Act." MacKinnon L.J. pointed out that in his opinion one of the difficulties would be this (3): "If the present action had been allowed to proceed "and succeed and the plaintiff had been awarded damages at "common law, I can think of no legal ground on which the "defendants could claim to deduct from the amount of those "damages the 81*l.* they had paid to him by those weekly "payments." Finlay L.J. said (3): "I think that this "particular case can be decided upon the ground upon which "indeed the learned judge below decided it—that is, on what "has been called the second limb of s. 29. That says "that 'the employer shall not be liable to pay compensation " 'for injury to a workman by accident arising out of and in " 'the course of the employment both independently of and " 'also under this Act'."

Mr. Maxwell Fyfe, who has said everything which it is possible to urge on behalf of the workman upon this head, has emphasized that there is this distinction between the case of *Perkins* v. *Hugh Stevenson & Sons, Ld.* (1), and the present case, that in *Perkins'* case the workman had made a claim, albeit he did not know what the effect of the claim would be on his rights at common law, whereas here the employers had brought the man the

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(1) Ante p. 56, 66.
(2) Ibid. 56, 65.
(3) Ibid. 70.

Slesser L.J.

payment in the first instance and he had accepted it by way of compensation. In my opinion, while that may make some difference with regard to the first limb of s. 29 in this sense, that that section dealing with claims or taking of proceedings does not apply to the case where the employer has offered without any claim being made to pay compensation and the workman has received it as compensation, it does not make any difference with regard to the second limb. That is to say that if Mr. Maxwell Fyfe's contention were correct the employer would be made liable to pay compensation to a workman injured by accident arising out of and in the course of the employment independently and also under the Act—the very thing which this statute says shall not be done. The mere fact that instead of waiting for the claim the employer pays the money which is accepted by the workman as compensation does not seem to me to distinguish it from the case where first a claim is made and thereafter compensation is paid, both of them being cases where the employer has paid compensation for injury to a workman, and both being cases where, having paid that compensation, it is expressly stated in the Act that he shall not be liable to any proceedings independently of this Act. I would point out in conclusion the extraordinary result that would arise if Mr. Maxwell Fyfe's argument were correct. An employer who was sufficiently generous to offer the compensation before there was any claim made upon him, which was subsequently received as compensation by the workman, would be liable notwithstanding his generosity to an action against him at common law, whereas the employer who waited until such time as the workman made his claim and then paid would be exempt from any such action. If that were the effect of the legislation I agree we should have to give force to it; but, in my opinion, no such dilemma arises. As I think Finlay L.J. pointed out in the *Perkins'* case (1), the language of the second limb of s. 29 covers the case where there is liability to pay compensation, whether that liability is discharged by payment after a claim or whether it is

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(1) Ante p. 56.

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discharged before a claim and acknowledged as compensation by the workman. Of course, if the workman does not receive the money as compensation under the Workman's Compensation Act, different considerations arise: if it is presented to him as a gift and he declines to take it that is another matter. But here this workman states quite frankly that he did so receive it under the statute as compensation.

In my view, therefore, the case of *Perkins* v. *Hugh Stevenson & Sons, Ld.* (1), must apply in principle to this case equally as to the case where a claim has been made by the workman, and this appeal on this preliminary point succeeds.

MACKINNON L.J. I agree.

I think the principle that this Court laid down in *Perkins* v. *Hugh Stevenson & Sons, Ld.* (1), must apply to the facts of the present case. It is quite impossible for Mr. Maxwell Fyfe to suggest any real distinction between the two cases. If *Perkins* v. *Hugh Stevenson & Sons, Ld.* (1), was rightly decided, as I have to assume it was, it is conclusive of the appeal in this case. I agree, therefore, that the appeal should be allowed.

DU PARCQ L.J. I have come to the same conclusion.

The material words of the Act are: "the employer shall "not be liable to pay compensation for injury to a workman "by accident arising out of and in the course of the employment "both independently of and also under this Act." The reasoning adopted by this Court in *Perkins* v. *Hugh Stevenson & Sons, Ld.* (1), I understand to be this. An employer who has paid compensation under the Act, if judgment is given against him for damages in a common law action in respect of the same accident, will thereby be rendered liable to pay compensation both independently of and also under the Act. In such circumstances a judgment for damages in a common law action will necessarily contravene the second limb of s. 29, and, therefore, no such judgment can lawfully be given. That was, it appears to me, clearly the ratio decidendi of

(1) Ante p. 56.

Perkins v. *Hugh Stevenson & Sons, Ld.* (1) Mr. Maxwell Fyfe was driven to argue that the case was decided in this Court on the first limb of the section and not on the second limb. The judgments of MacKinnon L.J. and Finlay L.J. deal entirely with that second limb and a great part of the judgment of the Master of the Rolls is concerned with it.

Having said that, I only desire to add this, that, speaking for myself, I am not at all sure that if I had not had the advantage of that authority I should have very readily seen that this result follows from the words of the Act of Parliament. The position here is that a workman, who did not even know or is not proved to have known that there were any facts which gave him a right to an action for damages at common law, has accepted, knowing it to be paid as compensation under the Act, a sum of money so paid. I think myself, to use the words which were used by the Master of the Rolls, that the Legislature clearly meant that the employer should not be made to pay twice over. I cannot help feeling some doubt whether the Legislature intended the result to follow, where a workman has taken a comparatively small sum in part payment of compensation, that even though he may be prepared to account for it or return it he is not to be permitted to bring his action for damages at common law. I say that in justice to the learned judge, because I sympathize with his difficulties and I feel that I might, in the absence of the authority which is before us, have come to the same conclusion as that to which he came. I agree that that authority is conclusive, that we are bound by it and that the appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Gregory, Rowcliffe & Co., for Peace & Ellis, Wigan.*

Solicitors for respondent: *Oddie & Roebuck, Blackburn.*

R. F. S.

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(1) Ante p. 56.

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Oct. 9, 19.

HEWITT *v.* BONVIN AND ANOTHER.

[1938. H. 146.]

Negligence—Son driving father's motor-car for his own purpose—Whether son was acting as servant or agent of father—Liability of father for tortious act of son.

A son obtained from his mother, who had authority to grant it, permission to drive his father's motor-car. The son wanted the car for his own purposes in order to drive two girl friends home to Wisbech. Neither the father nor the mother knew the girls and it was no concern of either of them that the girls should be driven to Wisbech. On the way back, through the negligent driving of the son, the car was upset and a friend who had accompanied the party to Wisbech was killed. In an action by the administrator of the deceased man against the father, the owner of the car:—

Held, by the Court of Appeal, reversing Lewis J., that the son was not driving the car as his father's servant or agent or for his father's purposes, and that therefore the father was not liable for his son's tortious act.

APPEAL from a decision of Lewis J.

The following statement of facts is taken from the judgment of MacKinnon L.J.

In this case the plaintiff sues as administrator of his son, Charles Hewitt, deceased. There are two defendants, John Bonvin and Candide Bonvin his father. Very early in the morning of August 23, 1937, John Bonvin, then a youth of 18, was driving a motor-car from Wisbech towards Ely. Charles Hewitt was a passenger in the car. Through the negligent driving of John Bonvin the car was upset and young Hewitt was killed. The plaintiff claimed damages against the two defendants, and Lewis J. has awarded him 747*l.*

The claim against the father Candide Bonvin, was because the car was his property; the judge held that John Bonvin was driving the car as the servant or agent of his father. From this decision the father appeals.

The further material facts are these. The father's car had on previous occasions been driven by the son John, and by his brother, Edgar. Owing to an incident in July, 1937, the father told them they were never to drive his car without his permission. Late on the night of August 22, John Bonvin wanted to borrow the car. His father was away from his London home. John applied to his mother. She had authority from her husband to permit him to drive the car, and she gave him permission. John wanted to use the car solely for his own purposes, in fact to drive Hewitt and two girl friends of theirs from London to Wisbech. Neither the father nor the mother knew the girls, and it was no concern of either of them that the girls should be driven to Wisbech. John Bonvin took the girls and Hewitt to Wisbech. The disaster happened when he was bringing Hewitt back to London in the car.

Melford Stevenson for the appellant. The decision of Lewis J. that young Bonvin, the first defendant, was driving the car as the agent of his father, the second defendant, was wrong. Even when a man lends a car to another person the borrower does not ipso facto become the agent of the lender. Scrutton L.J. held in *Higbid* v. *R. C. Hammett, Ld.* (1) that where an employee for his own purposes used his employers' bicycle, by the employers' permission, the employers were not liable for the employee's negligence. In the present case young Bonvin was driving the car for his own purposes and not for his father's purposes. Scrutton L.J. said in *Parker* v. *Miller* (2) that " the test of agency in cases of negligence had ever since "*Quarman* v. *Burnett* (3) been, not physical control, but right "to control." Lewis J. has placed too wide an interpretation upon those words. It is clear from the judgment of Lord Atkinson in *Samson* v. *Aitchison* (4) that the " right of control " means the right to control the way in which the car is being driven. The Court of Appeal held, in *Parker* v. *Miller* (5), the owner of a car liable though the accident happened when he was not himself present and his friend had left the car standing outside his own house. That case is difficult to reconcile with the later cases and is criticized in Salmond on Torts, 9th ed., p. 91.

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(1) (1932) 49 Times L. R. 104.
(2) (1926) 42 Times L. R. 408, 409.
(3) (1840) 6 M. & W. 499.
(4) [1912] A. C. 844, 850.
(5) 42 Times L. R. 408.

[BENNETT J. A driver of a motor-car must be doing something for the owner of the car in order to become an agent of the owner. The mere fact of consent by the owner to use a chattel is not evidence of agency.]

It was held in *Barnard* v. *Sully* (1) that where a plaintiff in an action for negligence proves that damage has been caused by the defendant's motor-car, the fact of ownership of the motor-car is prima facie evidence that the motor-car, at the material time, was being driven by the owner or by his servant or agent. That case merely decided that there was some evidence to go to the jury. In the present case there is an entire absence of the relationship of master and servant. The relationship of father and son has no bearing upon the present case. There was no evidence here of instructions by the father to his son to do anything. There is a distinction between instructions to do something and permission to do the same thing. In *Britt* v. *Galmoye and Nevill* (2) the first defendant who had the second defendant in his employment as a van driver, lent him his private motor-car, after the day's work was finished to take friends to a theatre. The second defendant by his negligent driving injured the plaintiff. Shearman J. held that as the journey was not on the master's business and the master was not in control he was not liable for his servant's act. That is an example of the true principle which ought to be followed in the present case.

B. L. A. O'Malley for the respondent. There was an obligation on the owner of this car to insure against accidents to third parties. The car was a family car although driven usually by the father. If an accident happens when a car is driven by a member of the owner's family, the driver is usually regarded as driving the car as the agent of the father. There was evidence here upon which the judge could find that the son was driving the car as the agent of the owner of the car. The permission to drive the car was given to the son by his mother, who was authorized by her husband to give that permission, and it was given to enable the son to drive the two girls home

(1) (1931) 47 Times L. R. 557. (2) (1928) 44 Times L. R. 294.

to Wisbech and thus get them out of their difficulties. The specific journey was authorized by the mother, and the son therefore stood in the shoes of his father and was driving as the agent of his father. The question of agency did not arise in *Higbid* v. *R. C. Hammett, Ld.* (1), but only the question whether the accident happened in the course of the boy's employment. The other cases cited do not assist in the present case, which is one sui juris. Where a car is insured and owned by a father and his son obtains permission to drive the car, there is abundant evidence upon which the judge can hold that the son in driving the car was acting as the agent of his father, so as to make the father liable for any accident while the son was driving.

Cur. adv. vult.

1939. Oct. 19. The following judgments were read :—

MACKINNON L.J. [after stating the facts set out above, continued as follows :] The question is whether, upon these facts, the father is liable for the damages resulting from young Bonvin's negligent driving.

If A suffers damage by the wrongful act of B, and seeks to say that C is liable for that damage he must establish that in doing the act B acted as the agent or servant of C. If he says that he was C's agent he must further show that C authorized the act. If he can establish that B was the servant of C the question of authority need not arise. A master is jointly and severally liable with his servant for any tort committed by the servant in the course of his employment. If in this case the plaintiff is to make Bonvin the father liable for the damages he claims he must establish that the son was driving the car as the servant of his father, and in the course of his employment.

I think the definition of a servant in Salmond on Torts can hardly be bettered: " A servant may be defined as any person "employed by another to do work for him on the terms that "he, the servant, is to be subject to the control and directions

(1) 49 Times L. R. 104.

"of his employer in respect of the manner in which his work "is to be done." The emphasis on the control and directions of the employer in this has no doubt reference to the well known case of *Quarman* v. *Burnett.* (1) The driver of the vehicle there was obviously a servant, but he might be regarded as the servant of one or other of two persons as his employer; which of them was his employer depended on the question of control and direction; and that emphasis is further material upon the difference between a servant and an independent contractor.

But before any question as to the right of control and direction over the tortfeasor arises at all, it must be established that in doing the act complained of he was employed by the third party to do work for him. This cannot be established by mere proof that the tortfeasor is using a chattel, or driving a vehicle, which is the property of a third party, though that may, in the absence of any further explanation, be some evidence of the proposition. If I lend my bicycle to a friend for him to ride on his concerns he is not my servant to ride the bicycle as work for me. On the other hand, if a grocer provides his errand boy with a bicycle on which to carry parcels to his customers, the boy is no doubt employed by the grocer to ride the bicycle as work for his employer.

A man may, of course, be temporarily employed as a servant without remuneration. If I say to a friend, or to my son, "The chauffeur is ill and cannot come. Will you drive me "in my car to the station," he is no doubt pro tempore my servant, and he is doing my work for me. But even a man who is in every sense a servant, to make his undoubted employer liable for his negligent act, must at the moment of his act be doing work for his employer. If a regularly employed chauffeur, when driving his master's car, knocks some one down, the employer will yet escape liability if he shows that the chauffeur was using the car on an unauthorized journey for his own purpose or benefit; he is at the time not doing his master's work.

As I see it, the plaintiff, to make the father Bonvin liable

(1) 6 M. & W. 499.

must establish (1.) that the son was employed to drive the car as his father's servant, and (2.) that he was, when the accident happened, driving the car for the father, and not merely for his own benefit and for his own concerns. In my opinion the plaintiff did not establish either of these propositions. The boy took out and used the car, following upon an interview with his mother. Treating the mother as the fully authorized agent of her husband, all that she said or did amounts to no more than : " I will lend you your father's "car for you to use." He was not employed to drive it as his father's servant, and when the accident happened he was not doing any work of his father's. He was driving his own friend, for his own purpose, and the father had absolutely no interest or concern in what he was doing.

Bennett J., in the course of the argument, put a question which seemed to me to be very much to the point. Suppose a son says to his father : "I have been invited to shoot next "Saturday in the country ; will you kindly lend me your gun, "and will you lend me your car to get down there ?" The father agrees to both requests. If at the shoot the son maladroitly peppers a beater, can his victim sue the father for damages ? And if, coming home in the car, the son knocks down a pedestrian, can that second victim sue the father for damages ? I can see no valid distinction between the two cases. Each of them is the loan of a chattel to be used for his own purposes by the borrower. And neither of them is a case of the employment of a servant to do his work for the employer.

The essential passage in the judgment of Lewis J. is the following sentence : " It seems to me clear that the boy was "driving this car with the consent of the owner. Therefore "he was on that journey the servant or agent—the agent— "of Mr. Bonvin." I am quite sure that that is an erroneous statement of the law. In the result I think this appeal should be allowed with costs, and judgment in the action entered for the appellant with costs.

DU PARCQ L.J. In this case the statement of claim alleged that the first defendant, the son of the appellant, was driving the appellant's car "as servant or agent of his father" at the time when his negligent driving caused the death of Charles Cuthbertson Hewitt. The appellant was admittedly the owner of the car, and the son's negligence has been established. The question in dispute is whether the evidence proved that the son was driving in such circumstances as to make the appellant liable for the consequences of his negligence.

It is plain that the appellant's ownership of the car cannot of itself impose any liability upon him. It has long been settled law that where the owner of a carriage or other chattel confides it to another person who is not his servant or agent, he is not responsible merely by reason of his ownership for any damage which it may do in that other's hands. See the judgment of Littledale J. in *Laugher* v. *Pointer* (1), where the distinction is drawn between the responsibility of the owner of movable property and that of the occupier of a house or land. This part of the judgment of Littledale J. was expressly approved by the Court of Exchequer in *Quarman* v. *Burnett*, per Baron Parke. (2) It is true that if a plaintiff proves that a vehicle was negligently driven and that the defendant was its owner, and the Court is left without further information, it is legitimate to draw the inference that the negligent driver was either the owner himself, or some servant or agent of his: *Barnard* v. *Sully* (3); but in the present case all the facts were ascertained and the judge was not left to draw an inference from incomplete data.

I understood the respondent's counsel to rely on the allegation of agency rather than on the alternative allegation that the appellant's son was, at any rate for the time being, his servant. This was no doubt the better way of putting the respondent's case, because on the evidence it is easier to suggest agency than service, and proof of agency is all that is required in order that the judgment which the respondent has secured may be retained. The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty. Thus, in *Wheatley* v. *Patrick* (1) the defendant, who had borrowed a horse and gig for an excursion to the country, permitted a friend to drive on the way home. The friend's negligent driving caused damage to the plaintiff. The declaration alleged that the defendant had himself driven negligently, and the Court of Exchequer held that this allegation was supported by the evidence. The reason is plain. The defendant had delegated to his friend the duty of driving and was personally responsible for his acts as the acts, not of a servant, but of an agent. There could hardly be a better illustration of the maxim qui facit per alium facit per se. The decision of the Privy Council in *Samson* v. *Aitchison* (2) was founded on the same principle.

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(1) (1826) 5 B. & C. 547, 561-563.
(2) 6 M. & W. 499, 509, 510, 511.
(3) 47 Times L. R. 557.

It must be added that, in the present case, agency is not negatived merely by the fact that the appellant had parted with the possession of the car to his son. It is, I think, plain both on principle and on authority, that the owner, or other person having the control of a vehicle may be responsible for the acts of the person driving it, on the ground of agency, even though he was not present in or near the vehicle so as to be able to exercise control over the driver. For such a case see *Thompson* v. *Reynolds* (3), a decision of the Court of Appeal of Northern Ireland. The decision in this Court in *Parker* v. *Miller* (4), which has troubled some text book writers is, I think, merely another illustration of the same principle. In *Parker* v. *Miller* (4) this Court differed from a Divisional Court as to the effect of the evidence, but not, apparently, as to the law. The report is meagre, but it would seem that the defendant, who had been taking a friend and the friend's daughter for a drive, got out of the car and permitted or requested the friend to drive himself and his daughter home. The county court judge, whose decision on questions of fact was of course not open to review, must, I think, have drawn the inference that the defendant had delegated the tasks of conveying the female passenger to her destination and of looking after the car to his friend, who was therefore in charge of the car as his agent, and not merely as a bailee.

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(1) (1837) 2 M. & W. 650.

(2) [1912] A. C. 844.

(3) [1926] N. I. 131.

(4) 42 Times L. R. 408.

If I am right as to the law, it follows that the learned judge's decision can be supported if, and only if, the evidence proves that the appellant's son was acting for and on behalf of the appellant. Unfortunately it is not clear that the learned judge applied his mind to this precise question. The judge has found that the son had permission to drive the car, or at least that his mother, who had authority to represent the appellant, knew that he was taking the car, and knew the purpose for which he was taking it. This finding is consistent with a mere loan or bailment of the car. If, however, this Court had thought that on a fair view of the evidence agency was established, it would clearly have been right to dismiss the appeal. In my opinion agency was not proved. Before us counsel for the respondent relied on the fact that the driver of the car was the son of the appellant. Although it would be absurd to say that such a relationship is of itself evidence of agency, I agree that when considered in combination with other circumstances it may be in some cases both relevant and significant. If, for instance, a father consents to his young son inviting a guest to the family home, and then permits him to use the father's car for the entertainment or convenience of the guest, it may well be a justifiable conclusion that the son is driving for and on behalf of the father. Ultimately the question is always one of fact. In the present case, if the girls concerned had been the guests of the appellant, or if it had been established that Madame Bonvin had allowed her son to take the car because she felt that she and her husband were under some social or moral duty to convey them to their home, I should have thought that the finding of the learned judge ought not to be disturbed. In fact, as MacKinnon L.J. has said, neither the appellant nor Madame Bonvin was responsible for the welfare of the girls, and I am not satisfied that Madame Bonvin even approved of the journey, much less that she regarded its performance as a duty to be delegated to her son. The plaintiff has failed to show more than a bailment of the car by the appellant to the person responsible for driving it negligently. This is not enough to make the appellant liable, and I therefore agree that the appeal must be allowed.

BENNETT J. (whose judgment was read by MacKinnon L.J.) I have had the advantage of reading the judgment prepared by my Lord and by du Parcq L.J. I entirely agree with what they have said and feel that I cannot usefully add anything.

I agree that the appeal should be allowed, and that the respondent must pay the appellant's costs of the appeal and those incurred by him in the Court below.

Appeal allowed.

Solicitors for appellant: *Greene & Underhill.*
Solicitors for respondent: *Russell & Arnholz.*

R. F. S.

C. A.

1939
Oct. 10.

GRIGGS *v.* PETTS.

Costs—Payment into Court by defendant—Non-acceptance by plaintiffs within seven days of payment in—Acceptance by plaintiffs at trial of action—Application by plaintiffs for costs up to date of payment in—Application by defendant for costs incurred since date of payment in—Refusal by judge to give those costs to defendant—Appeal by defendant—Appeal as to exercise of judge's discretion and not as to costs—Injustice done to defendant—R. S. C., Order XXII., *r.* 3.

An action was brought for personal injuries sustained by the plaintiffs through the negligent driving by the defendant of a motor-car. The defendant in his defence, delivered on October 26, 1938, denied the alleged negligence. On January 12, 1939, the defendant paid money in Court, while denying liability. At the trial on February 14, 1939, plaintiffs' counsel said that the plaintiffs would take the money out of Court and asked for an order for payment out under Order XXII., r. 3. The defendant's counsel asked that the defendant should be given the costs incurred since the date of payment in. The judge gave the plaintiffs costs up to the date of payment in, but ordered that thereafter there should be no order as to costs. On appeal by the defendant :—

Held, that the order appealed from was not one as to costs only but one authorizing the payment of money out of Court, and that as the costs incurred by the defendant subsequent to the date of payment in were wholly attributable to the failure of the plaintiffs to take the money out of Court within seven days of the payment in the defendant had suffered an injustice by being left liable to pay them. The discretion of the judge had been wrongly exercised ; leave to take the money out of Court should only have been given upon the basis that the defendant did not have to bear those costs. The case must therefore be sent back for trial.

APPEAL from a decision of Humphreys J., sitting at the Norwich Assizes.

Lewis James Griggs and Hilda Mary Griggs sued Charles Petts for damages for personal injuries sustained by reason of the negligent driving by the defendant of a motor-car, in which they were passengers, near King's Lynn, on May 29, 1938. The statement of claim was delivered on August 17, 1938, and contained particulars of the alleged negligence and of the injuries sustained by the two plaintiffs.

The defendant, in a defence delivered on October 26, 1938, denied the alleged negligence, and said that the accident was caused by a skid, and that he could not by the exercise of reasonable care have foreseen or prevented the skid. He also refused to admit that the plaintiffs had suffered damages.

On January 12, 1939, the defendant served a notice upon the two plaintiffs stating that he had paid 700*l.* into Court, apportioned as to 100*l.* to satisfy L. J. Griggs' claim, and as to 600*l.* to satisfy the claim of Hilda Mary Griggs, but denying liability. Notice of trial had been given for the next Norwich Assizes, which commenced on January 25, 1939, but the trial was postponed and took place in fact upon February 14, 1939.

When the case came on before Humphreys J., Mr. Doughty K.C., who appeared for the plaintiffs, said that his Lordship would not be troubled with the case as the plaintiffs would take out the money which was in Court, and he asked for the usual order as to payment out under Order XXII., r. 3. (1) He went on to say that "With regard to costs, they are "subject to your Lordship's discretion."

Mr. Beresford K.C., who appeared for the defendant, did not raise any objection to the learned judge making an order as to payment out under Order XXII., r. 3, but he asked the learned judge to give the defendant the costs from the date of payment in. The learned judge did not accede to Mr. Beresford's application. The order as drawn up was as follows: "It is this day adjudged that the male plaintiff "recover against the defendant 100*l.*, and the female plaintiff "recover 600*l.* and costs to be taxed up to the date of "payment in, thereafter no order as to costs."

The defendant appealed. The appeal was heard on October 10, 1939.

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(1) Rules of the Supreme Court, Order XXII., r. 2: "(1.) Where "money is paid into court under "Rule 1 the plaintiff may within "seven days of the receipt of the "notice of payment into court ". . . . accept the whole sum ". . . . in satisfaction of the "claim . . . . and thereupon he "shall be entitled to receive payment of the accepted sum or "sums in satisfaction as aforesaid."

Rule 3: "If the whole of the "money in court is not taken out "under Rule 2, the money remaining in court shall not be paid out "except in satisfaction of the "claim . . . . and in pursuance "of an order of the court or a "Judge, which may be made at any "time before, at or after trial."

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Tristram Beresford K.C. and *Gordon Alchin* (for *H. E. R. Boileau*, serving with H.M. Forces) for the appellant. The plaintiffs could have taken the money out of Court without the leave of the Court under Order XXII., r. 2, within seven days of its payment in. But as they did not take the money out of Court within the seven days they could not afterwards take the money out of Court without the leave of the Court. The judge ought not to have allowed the money to be taken out of Court at the date of trial without an order providing for the payment to the defendant of the costs which the defendant had incurred in preparing for trial after the date of payment in. This is an appeal from the exercise of the judge's discretion, and not merely an appeal as to costs. There ought to be an order for a new trial, or, alternatively, an order for payment to the defendant of the costs incurred by him since the payment in. *Frazer & Haws, Ld.* v. *Burns* (1) was referred to.

Doughty K.C., *R. A. B. Powell* for *Greer Jackson* for the respondents. This is an appeal as to costs only, and as the judge did not give leave to appeal, the Court of Appeal has no jurisdiction to interfere with his order. Sect. 31, sub-s. 1 (*h*), of the Supreme Court of Judicature Act, 1925, provides that "no appeal shall lie . . . . without the leave of the Court or "judge making the order . . . . as to costs only." See also the decision of the House of Lords in *Donald Campbell & Co., Ld.* v. *Pollak.* (2)

The practice was started in *Wagstaffe* v. *Bentley* (3) that where in an action for injuries arising from the negligence of the defendant, and the defendant paid money into Court but denying liability, if the plaintiff recovered less than the amount paid into Court to give the plaintiff the costs of the issue of negligence on which he had succeeded. That practice was altered by the Rules made in 1933 under which the costs are in the absolute discretion of the judge. This order did not work an injustice, because there was nothing to show that the 700*l.* paid into Court was too much. The Court will only interfere in a case where there has been an obvious mistake or in a case of fraud.

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(1) (1934) 49 Ll. L. Rep. 216.
(2) [1927] A. C. 732.
(3) [1902] 1 K. B. 124.

Brown v. *New Empress Saloons, Ld.* (1), was referred to.

SLESSER L.J. stated the facts set out above and continued: From the order made by Humphreys J., Mr. Beresford, on behalf of the defendant, appeals, and he asks either that the trial between the parties should continue or that there should be a new trial, or alternatively that an order be made by this Court giving him the costs after payment in. The first objection that Mr. Doughty takes to Mr. Beresford's argument is this. He says that this Court has no jurisdiction; he relies upon the well known judgment in *Donald Campbell & Co., Ld.* v. *Pollak* (2) and on the statutory provisions contained in the Supreme Court of Judicature Act, 1925, s. 31, sub-s. 1 (*h*), which says that "no appeal shall lie . . . . without the leave "of the court . . . . as to costs only which by law are left to "the discretion of the court," and he also relies on the rules made thereunder giving the Court such discretion. In my view the order here appealed from was not an order as to costs only which by law are left to the discretion of the judge. The order which was sought by Mr. Doughty in the Court below was an order of the judge authorizing money which had been paid into Court, and had remained there more than seven days, to be paid out, and that is the order of which complaint is made in the present case. It is not an order as to costs only and, therefore, does not, in my opinion, fall within the ambit of s. 31 of the Act of 1925, nor within the Rules of the Supreme Court dealing with discretion as to costs.

That being so, it appears to me that this is a case where prima facie the judge has a discretion, as the rule indicates, but that discretion is subject to appeal and, as has recently been pointed out by Lord Atkin in *Evans* v. *Bartlam* (3), it is a mistake to think that the Court of Appeal has no power in a proper case to interfere with the exercise of that discretion unless it thinks the judge acted upon some wrong principle of

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(1) (1937) 53 Times L. R. 457.

(2) [1927] A. C. 732.

(3) [1937] A. C. 473, 480.

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law. Lord Atkin points out that while the Court of Appeal normally will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it. This question then arises: Is this order, which I have read saying that no order should be made as to costs, one which would cause injustice to be done? In my opinion it would. The costs which the defendant has incurred after the payment in, which may be great in certain cases, in other cases may be small—that is a matter for the Taxing Master—are costs which he need not have incurred had the money paid in been taken out before he incurred those expenses. They seem to me to be expenses wholly attributable to the failure of the plaintiffs in taking out the money at an earlier date or in applying to the Court, if the time be over seven days, for leave to take out those moneys an application for which "may be made "at any time before, at or after the trial." (Order XXII., r. 3.) That was not done and the result is that the defendant has incurred expenses caused by the plaintiffs for which the order has given no remedy. He has suffered an injustice, the discretion of the learned judge in this case was wrongly exercised and leave should only have been given upon the basis that the defendant should not have suffered the injustice of having to pay those costs.

It follows that the appellant is entitled to ask that this matter be now tried. As the matter stands the learned judge made an order for payment out to the plaintiffs which he ought not to have made. In those circumstances, that order being, in my view, one which cannot be maintained, the case is in precisely the same position as if no order at all had been made. I think that part of the notice of appeal which asks that the action be sent back to the next Norwich Assizes for trial is a request which ought to be complied with, and that this Court should order in accordance with the notice of appeal that the action be sent back to the next Norwich Assizes for trial; but we reject that part of the notice of appeal which asks for an order for the payment to the defendant of the costs incurred by him since the payment in. This appeal, therefore, to that extent succeeds and is allowed with costs.

MACKINNON L.J. I agree, and I do not think I need add anything.

DU PARCQ L.J. I agree, and I also do not find it necessary to add anything.

Appeal allowed.
Order for trial.

Solicitors for appellant: *Kenneth Brown, Baker, Baker.*
Solicitors for respondents: *Metcalfe, Copeman & Pettefar.*

R. F. S.

Distinguished. YATES (INSPECTOR OF TAXES) *v.* STARKEY. [1950] 2 All E.R. 614.

[1940] 1 K. 1.
TIRARD.

Distinguished. YATES (INSPR. OF TAXES) *v.* STARKEY
[1951] 1 Ch. 45

C. A.
1939
Nov. 2.

STEVENS (INSPECTOR OF TAXES) *v.* TIRARD.

Revenue—Income tax—Deduction in respect of children—Payments for maintenance and education of children—Payments made to wife as custodian of children under Divorce Court order—Whether income of child "in his own right"—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 193—*Finance Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 18), *s.* 21, *sub-s.* 3.

In divorce proceedings brought by the wife she was given the custody of the three children of the marriage and the husband (respondent in the present appeal) was ordered by the Court to pay to the wife, during the joint lives of the petitioner and the respondent, for the maintenance and education of the three children, sums of 90*l.*, 90*l.* and 70*l.* per annum, less tax, in equal monthly instalments. The husband claimed that on the true construction of the order of the Divorce Court the said payments formed part of the alimony which he paid to the wife, and that he was entitled to a deduction in his assessment for income tax in respect of children's allowances under s. 21 of the Finance Act, 1920. For the Crown, on the other hand, it was contended that the said payments were income to which the children were entitled in their own right and therefore no deductions were allowable by reason of sub-s. 3 of s. 21 :—

Held, by the Court of Appeal, that the money formed part of the alimony paid to the wife for the maintenance of the children and was not income of the children in their own right ; and therefore, that the husband was entitled to the deduction which he claimed in respect of the children.

Judgment of Lawrence J. [1939] 2 K. B. 410 affirmed.

In re Frame. Edwards v. *Taylor* [1939] 1 Ch. 700 held inapplicable.

APPEAL from the judgment of Lawrence J., on a Case stated by the Commissioners for the General Purposes of the Income Tax for the Division of Kensington in the County of Middlesex.

The material portions of the Case were as follow :—

At a meeting of the Commissioners held on June 29, 1938, Nestor Seppings Tirard (hereinafter called "the respondent") appealed against the following additional assessments made on him under Schedule D of the Income Tax Act, 1918, in respect of disallowed children's allowances :—

For the year ending April 5, 1933, in the sum of 6*l.*
,, ,, ,, 1934, ,, ,, 130*l.*
,, ,, ,, 1935, ,, ,, 130*l.*
,, ,, ,, 1936, ,, ,, 100*l.*
,, ,, ,, 1938, ,, ,, 60*l.*

these additional assessments being arrived at by disallowing sums equal to the amounts of the assessments which had previously been allowed to the respondent in respect of children's allowances.

The following facts were admitted or agreed :—

(*a*) In the year 1929 the respondent was divorced on the petition of his then wife and she was given the custody of the three children of the marriage.

(*b*) By an order of the High Court of Justice, P. D. and A. Division (Divorce) dated January 21, 1930, the respondent was ordered to pay to his former wife : (i.) for the maintenance of the said wife the sum of 500*l.* per annum during the joint lives of the respondent and the said wife ; (ii.) for the maintenance and education of the said three children of the marriage the following sums respectively : John 90*l.* per annum, Robert 90*l.* per annum, and Ann 70*l.* per annum, in each case less tax.

The order of the Court was in the following terms :—

(1.) That during the joint lives of the petitioner and the respondent until further order the respondent do pay to the petitioner the sum of 500*l.* per annum less tax as from July 4, 1929, in equal monthly instalments payable in advance on the first day of each month.

(2.) That during the joint lives and until further order the respondent do pay to the petitioner for the maintenance and education of the child John until he shall attain the age of twenty-one years or marry under that age the sum of 90*l.* per annum less tax as from July 4, 1929, in equal instalments payable in advance of the first day of each month.

Clauses (3.) and (4.) of the order made provision for the children Robert and Ann respectively in terms similar to those of clause (2.).

The respondent had duly paid to his former wife the sums mentioned for the children (less tax) and she, as guardian of the respective children, had preferred repayment claims on their behalf, on the basis that the said sums were the income of the respective children, which claims had been allowed.

For the years in question the respondent claimed, and was allowed, children's allowance at the appropriate rate of tax, in respect of these three children, in the first assessments made on him.

The respondent's return for income tax did not disclose the amounts of the sums payable to his former wife in respect of each child, but merely referred to them as "share in alimony."

On the attention of the appellant, the Inspector of Taxes, being drawn to the said claims for repayment of tax made by the respondent's former wife on behalf of the said children, as aforesaid, in respect of the amount payable by the respondent under the said order, the matter was brought before the additional Commissioners acting for the Division, who made the additional assessments now under appeal.

On behalf of the respondent it was contended: that the only question for the decision of the Commissioners was the correct interpretation to be placed on the said order, so far as the payments made to the respondent's former wife in respect of the children were concerned; that on a true construction of the order the said payments were income of the respondent's said former wife, and were not income of the children, the case of *Jodrell* v. *Jodrell* (1) being referred to on this point; that the children's allowances referred to above had been rightly made to the respondent in the first assessments made on him, and the additional assessments appealed against were wrong in law and ought to be discharged.

The Inspector of Taxes, on behalf of the Crown, contended: that the case of *Jodrell* v. *Jodrell* (1) had no application to the facts of the present case; that the said order in this case provided for the payment of three separate sums for the maintenance and education of the said three children respectively, that the wife received the said sums as guardian having custody of the children, and that she was bound to account to them for those sums if required, and the cases of *Drummond* v.

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(1) (1851) 14 Beav. 397.

Collins (1) and *Johnstone* v. *Chamberlain* (2) were referred to; that each of the said three children of the respondent was entitled in his or her own right to an income which by s. 21, sub-s. 3, of the Finance Act, 1920 (3), as amended by subsequent enactments, precluded the respondent from being entitled to any deduction under s. 21 of the Finance Act, 1920, or any other section in respect of any of the said three children; and that the additional assessments should be confirmed.

The Commissioners discharged the additional assessments.

The Inspector of Taxes, on behalf of the Crown, appealed.

On May 16, 17, 18 and 26, 1939, the appeal was heard by Lawrence J., who on the last mentioned date gave judgment. He held that the decision of the Commissioners was right. The words of s. 21, sub-s. 3, of the Act of 1920 were clear and it could not be said that the child was entitled in his own right to money paid to his guardian for his maintenance. He had no title to any of the money. His only right was to be maintained; and, if the guardian could maintain him properly and save some of the money, the child had no interest in the money so saved. The payment of money to a wife on the condition that she was not accountable for the expenditure of the money, but was only bound properly to maintain the children, was inconsistent with the view that the money was the children's money in their own right. The money was not impressed with a trust, but was paid upon a condition. The appeal must be dismissed.

The Inspector of Taxes appealed. The appeal was heard on November 2, 1939.

Sir Terence O'Connor S.-G. and *Reginald Hills* for the appellant. Lawrence J. was wrong in holding that the respondent is entitled to any deduction from his income for purposes of taxation in respect of his children. Under the Finance Act, 1920, s. 21, sub-s. 1, in the absence of any reason to the contrary, a parent or guardian who is maintaining a child under the age of sixteen is no doubt entitled to a deduction of a specified sum from his taxable income in respect of each such child. But by sub-s. 3 of that section no deduction shall be allowed under the section in respect of any child who is entitled in his own right to an income exceeding a figure which has since been increased to 50*l.* a year. That sub-section prevents the respondent from claiming the deduction. On the true construction of the sub-section the words "in his own "right" are mere surplusage, and the sub-section prevents the deduction from being claimed in respect of any child who has the benefit of an income exceeding the statutory figure. However that may be, each of the children of the respondent is entitled in his or her own right to an income exceeding that figure. The Divorce Court having pronounced a decree divorcing the respondent from his then wife and giving her the custody of the three children of the marriage, made an order under the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 190 and 193, ordering the respondent to pay to his former wife under the earlier section an annual sum for her own maintenance, and under the later section an annual sum for the maintenance of each of the children. It is not disputed that the sums paid by the husband under such an order cease to be his income. It is submitted that on the true construction of the clauses of the order which are made under s. 193 of the Act of 1925, and of that section, the annual sum which the respondent is ordered to pay to his former wife for the maintenance of each of the children is not income of the wife, but is income of the child. That section provides that the Court may make an order for the payment of a sum for the maintenance of the child. If the sum ordered to be paid to the former wife for the maintenance of the child became the money of the wife, and was applied by her for that purpose, then she as well as the husband would be entitled to claim a deduction from income in respect of the child, a result which could not have been intended by the Legislature. Sect. 193 of the Act of 1925 gives the Court power to make an order for payment of money by one spouse to the other in trust for the child as beneficial owner, and the order made under the section in the present case constitutes the former wife a trustee of the money for the child as beneficial owner. The case of *In re Frame. Edwards* v. *Taylor* (1), which was decided before, though not reported until after, the judgment of Lawrence J. in the present case had been delivered, is applicable here. In that case a testator bequeathed all his money to a legatee on condition that she should adopt his daughter, but she was unable to obtain an adoption order; and it was held by Simonds J. that the bequest created a trust constituting the legatee a trustee to discharge, among other duties that of the maintenance of the child. So here the order of the Divorce Court constitutes the former wife a trustee of the money directed to be paid for the maintenance of the children of the marriage. The case of *Jodrell* v. *Jodrell* (2) does not show that money given to a mother for the maintenance of a child, so far as necessary for that purpose, is not the money of the child, but only that the mother on properly carrying out the trust for the maintenance of the child, is not bound to account for a surplus remaining in her hands. In the present case the sum directed by the order of the Court to be paid by the respondent to his former wife for the maintenance of each child being income to which the child is "entitled in his own right" within the meaning of s. 21, sub-s. 3, of the Act of 1920, no deduction in respect of it is allowable to the respondent.

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(1) [1915] A. C. 1011.

(2) (1933) 17 Tax Cas. 706.

(3) Finance Act, 1920, s. 21, sub-s. 3: "No deduction shall be "allowed under this section in "respect of any child who is "entitled in his own right to an "income exceeding forty pounds "a year." [Amount increased by subsequent enactments.]

Cyril King K.C. and *F. Grant* for the respondent were not called upon to argue.

SCOTT L.J. In this appeal, to speak for myself, I think the argument for the appellant is not consistent with either the language of the order of the Court or the language of ss. 190 and 193 of the Judicature Act, 1925.

I find myself in agreement with the judgment of the learned judge, and I adopt it as my own.

CLAUSON L.J. I agree with my Lord that this appeal should fail.

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(1) [1939] 1 Ch. 700.

(2) 14 Beav. 397.

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A husband and wife on the petition of the wife became involved in a divorce suit, and, as a result of the suit, the marriage was dissolved. Under ss. 190 and 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, an order was made by the Divorce Court in a familiar form. Sect. 190 enables the Court to make the husband provide for the wife's maintenance. Sect. 193 gives the Court certain powers to make such provision as appears just with respect to the custody, maintenance and education of the children. There were here three infant children.

In this particular case the order of the Court is on the following lines. Clause 1 provides: "That during the joint "lives of the petitioner and respondent until further order" the former husband is to pay to the former wife 500*l.* per annum less tax. Clauses 2, 3 and 4 of the order make provision in respect of the three children respectively. I take clause 2 as an example of the clauses relating to the children. It provides that during the joint lives of the husband and wife and until further order the husband is to pay to the wife for the maintenance and education of the child John until he shall attain the age of twenty-one years or marry under that age the sum of 90*l.* per annum less tax. Clauses 3 and 4 make provision for the other two children, Robert and Ann, respectively. The order proceeded on the footing, of course, that the custody of the three children had been given to the former wife. I do not find in the order any reference to the mother as custodian. That is probably because there is some previous order as to custody, or it may be that the former spouses arranged between them that the wife should have the custody.

The former husband had to make his income tax return and in making it he, of course, found his liability to taxation diminished by reason of the fact that, under the order, he had to provide these various sums out of his income. With that it is not necessary to trouble. But he found also that under s. 21, sub-s. 1, of the Finance Act, 1920, he was entitled, if he proved that he had living at any time within the year of assessment any child who was under the age of 16 years, to have, in respect of the first such child, a deduction of 50*l.* and in respect of each subsequent child a deduction of 40*l.*, in calculating the amount of his taxable income. It will be observed that that section says nothing whatever as to whether the claimant for deduction is maintaining the child at his expense. He has to prove, and he has to prove only, that the child or the children in respect of whom he makes the claim is or are living at the material period. Accordingly, the taxpayer in the present case did make such a claim, and the claim was, in the ordinary course, passed. For reasons which will appear when one looks at the matter from the standpoint of the former wife, the Revenue Authorities are now claiming a re-construction of the respondent's assessment on the footing that he ought not to have that deduction. They base their claim upon sub-s. 3 of the same section, which, as subsequently altered, provides: "No deduction shall be allowed under this section "in respect of any child who is entitled in his own right to "an income exceeding 50*l.* a year." The contention of the Revenue is that the effect of the order which I have stated is to provide in the case of the son John, if I may take him as an example, an income of 90*l.* a year which, so they suggest, is an income to which, under the order, he becomes entitled in his own right. If that be the correct position it follows that the deductions ought not to have been allowed, and the assessment must now be readjusted.

I want to emphasize that the sole question that the Court below had to decide, and which we have to decide now, is whether the effect of the order of the Divorce Court was to create in the child a title to an income of the amount specified.

To consider now the other side of the matter: The money having been paid to the former wife in accordance with the order, one would not expect her to be entitled to claim any deduction from her income under sub-s. 1, as the deduction has already been claimed by and allowed to the former husband. It would seem very anomalous that two parents should both be allowed in respect of their child a deduction, the basis of which would appear in equity to be that the deduction is allowed because of the child being a burden upon the financial position of the parents. It will be observed that the deduction has been allowed to the father although in respect of the burden upon him he has obtained this benefit, that the burden has been allowed of itself as a deduction from his taxable income.

Continuing to consider the position of the lady, if the correct view is that the order has made this sum of 90*l.* a year the income of John, she would be in a position as his guardian to claim on his behalf the return of the tax on the footing that his income was below the taxable limit. That claim, it will be observed, would have to be made on his behalf. If she recovered the tax, as she would on the assumption I have made, the returned tax would be the boy's own income. If the true construction of the order is that the boy's own income has been given to the mother for his maintenance then, of course, she would be entitled to keep that returned tax towards discharging the maintenance obligation. But that involves this proposition, that the effect of the order, which admittedly was made under s. 193, has been to create an income belonging to the infant, and then to give directions as to the manner in which the income of the infant should be dealt with, namely, that it should be paid to the mother for the child's maintenance.

If the contrary view be the correct one, and if these sums which are ordered to be paid to the lady swell her income so as to enable her to meet the maintenance obligation placed upon her, there is this very anomalous result, that it may be that this money, which does not really increase her own resources since it will have to be spent in substance in maintenance,. may have the effect of putting up her income to, let us say, an excess over the sur-tax figure. That is certainly an exceedingly anomalous result. Having regard to the anomalies which hang round the operation of the material section in the case where there has been a divorce and orders have been made on the lines of the legislation with which we are now dealing, it is not astonishing that it has been considered desirable to ascertain with reasonable clearness the exact state of the law on the subject with a view, no doubt, to putting these various anomalies right, if that be possible.

I return now to the main point and, in my view, the only point in the case, that is, whether the effect of the Divorce Court order has been to create a title in the infant to the income of 90*l.* there referred to. As a matter of construction of this order it appears to me abundantly clear that the scheme of the order is not at all to create an income to which the infant is in any way entitled. The scheme of the order is to increase the income of the mother so as to enable her to discharge the duty of maintenance laid upon her by the Court in view of her having the infant's custody. I find myself fortified in construing the order in that way, by the fact that there is, as I think, the gravest doubt whether under s. 193 there would be any jurisdiction in the Court to take income away from the father and make it the infant's income, though the Court has full jurisdiction to take money from the father and make it available for the benefit of the infant by putting it in the hands of the mother in whom, under the whole scheme which is completed by this order, are vested the rights of custody and the duty of maintaining the infant.

For these reasons it appears to me that the learned judge's judgment was correct.

It was suggested that the decision of Simonds J. in the case of *In re Frame. Edwards* v. *Taylor* (1) has some bearing upon the matter. That decision, the correctness of which I must not be understood for one moment to impugn, has no bearing at all upon any matter we have to consider in the present case. There a testator by his will gave a legacy to a legatee in the following terms: "all my money "and insurance policies . . . . on condition that she adopts "my daughter Alma Edwards and also gives to my "daughters Jessie Edwards and May Alice Edwards the "sum of 5*l.* each and a like sum of 5*l.* to my son Alexander "Edwards." A difficulty arose there because, although the lady in question attempted to obtain an adoption order which would have put on her in substance the liability of maintaining

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Alma Edwards, she was not able to get such an order, and the question was whether, in those circumstances, there was any trust enforceable by the Court in favour of Alma Edwards. The learned judge came to the conclusion on the construction of that will that the word "condition" was not used in a strict legal sense, but that the gift must be construed as a gift to the legatee on trust to do certain things: To provide the sums of 5*l*. each for the other children, and to do something in regard to Alma, the daughter as to whom the legatee failed to obtain an adoption order. On the construction of the words his Lordship held that there was a trust which the Court could enforce, and that the legatee was bound to apply the legacy in maintaining Alma Edwards during her infancy. As I have said, I do not for a moment suggest that the construction placed by the learned judge on that particular will was otherwise than correct, but the case appears to me to be of no assistance, because, as a matter of construction, the order does not create a trust of the money for the infant; further, had I been able to spell such a trust out of the words of the order, I should feel the gravest doubts whether the creation of such a trust is envisaged or authorized by s. 193 of the Act.

Accordingly in my view the decision of Lawrence J. in this case was perfectly correct. He could come to no other decision. It does remain that there are the most serious anomalies in regard to the incidence of income tax in cases such as the one we have had under review, but, of course, these are matters which must be dealt with, not by the Court, but by the Legislature.

I agree, therefore, that the appeal should be dismissed.

GODDARD L.J. I am of the same opinion. I should like, however, to add a few words, especially because I appreciate to the full how very unsatisfactory from every point of view is the position which arises. The reason why it arises is because when the matter of children's allowances was first introduced into the Finance Acts, this particular situation was not envisaged. When the Divorce Court is dealing with the case of a petitioning wife and there are children of the marriage, it does two things so far as maintenance is concerned: First, whether it acts under sub-s. 1 or sub-s. 2 of s. 190, it considers what is a proper sum that the lady should receive from her former husband for her life quite irrespective of whether there are children or not, and it fixes that sum. Then, if the custody of the children is given to the former wife it has to consider that she will be put to further expense owing to the fact that she has to maintain, educate and care for the children, and so, irrespective of the sum which it has already allowed to her for her own maintenance for her life, it allots to her a further sum for the maintenance of the children, usually but not invariably, I think, though I am not certain about this, until they become twenty-one and under the order as each child becomes twenty-one so much of the money as is paid to the mother for the maintenance of that child will cease.

The learned Solicitor-General will not think that I mean any disrespect to his very courageous argument when I say that it seems to me that the point taken by the Crown is unarguable. The money paid to the mother for the maintenance of the children is the mother's money paid to her to enable her to fulfil a duty which the Court has put upon her. If she does not fulfil that duty the remedy against her is not to make her account for the spending of the money which has been given to her, but to remove her from the position of custodian of the child, and to give the custody of the child to somebody else, together with the sum which the Court thinks fit to allow for its maintenance. I confess I do not see how it can possibly be made out that this money is the money of the child. It is the mother's money. She has the spending of it, and she is accountable to nobody for it. What she is answerable for is how she acts as guardian of the children. The position which results seems to me, as I have said, to be unsatisfactory from every point of view, and I think the attention of the Legislature might well be called to it. In the first place the husband can deduct from his income the money that he has to pay, not only to his wife for her own

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maintenance, but to his wife for the maintenance of the children; so he gets the advantage that, in finding out the income on which he has to be taxed, this money is deducted as a charge on his income. Then because, and only because, this point was not thought of when the Finance Act, 1920, was drawn, he is entitled also to claim a deduction for what is called the children's allowance. He thus gets a double benefit which seems to me to be an excessive reward to give to him for his failure to do his duty as a husband and, to that extent, as a father. The mother can now no longer claim, as she had done in this particular case, a personal allowance on behalf of the children and re-claim tax on the ground that no tax is payable by the children. She will have to treat the money as part of her income, and although it will not be so in this case, yet in certain cases where larger sums are in question, that might well work great hardship on her because it might bring her income up to the sur-tax limit, so that she might have to pay sur-tax as well as income tax. She at the same time is entitled under s. 21, having the custody of the children and they being her children, to claim the children's allowance and so, from the taxpayer's point of view, it is equally unsatisfactory, because in respect of the children of divorced parents in these circumstances the result is that two children's allowances are claimable.

I therefore think that this is a matter which might well be brought to the attention of the Legislature; but the sections being what they are, it is useless to ask this Court to put the matter right. I think it is really too clear for argument that the money in question is the mother's money and not the children's money.

Appeal dismissed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Reynolds, Sons & Gorst.*

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Oct. 20, 23; *Nov.* 6.

Emergency legislation—Courts, Emergency powers—Judgment—Enforcement of—Leave to proceed to execution—Application by plaintiff—Proof by defendant—Inability to satisfy judgment—Inability due to circumstances directly or indirectly attributable to the war—Meaning of "unable"—Necessity for proof by defendant of his actual financial position—Existence of other debts not an irrelevant consideration—Courts (Emergency Powers) Act, 1939 (2 & 3 *Geo.* 6, *c.* 67), *s.* 1.

Where an application is made by a plaintiff under s. 1 of the Courts (Emergency Powers) Act, 1939, for leave to proceed to execution or otherwise to enforce a judgment, the burden of proving that the defendant is unable immediately to satisfy the judgment, and that that inability arises by reason of circumstances directly or indirectly attributable to the war, lies on the defendant.

As a general rule, in cases falling under the provisions of the Act, information as to the actual financial position of the defendant, with a statement as to his assets and liabilities, must be furnished by him, and the decision of the Court should be made in the light of all the facts. Each case must be decided in relation to its own particular facts. If a judgment debtor is shown to have a sum of cash available to pay the judgment debt, it does not follow that he necessarily fails to establish that he is unable to satisfy it. The existence of other debts is not an irrelevant consideration.

Upon the facts the defendants were held not to have discharged the burden of proof resting upon them, but an opportunity was given them of tendering further evidence as to their financial position.

Appeal from an order of Oliver J. at Chambers.

The plaintiffs brought an action against the defendants, by specially endorsed writ dated September 13, 1939, by which the plaintiffs claimed against the defendants as acceptors the sum of 836*l.* 14*s.* 1*d.* due on certain bills of exchange which had been dishonoured. No appearance to the writ was entered, and on September 25, 1939, the plaintiffs signed judgment in default.

On September 26, 1939, the plaintiffs issued a summons under the Courts (Emergency Powers) Act, 1939, for leave to proceed to execution or otherwise to the enforcement of the judgment.

The only evidence put forward by the defendants consisted of an affidavit sworn by their chairman and managing director. From that affidavit it appeared that the defendants' business was that of selling furniture, in the main on hire-purchase terms. It showed that the defendants' business had suffered very seriously by reason of the outbreak of war. Receipts from hirers had fallen off. There had been a great decline in the volume of new business, and it could not be doubted that the defendants had fallen into serious embarrassments. The defendants' finance was conducted by means of loans from finance companies, and the situation might be summarized in three extracts from the affidavit. In para. 11 it was stated that "the accumulated result of these matters is that the "company finds itself without sufficient means to enable it "to discharge the claims of the plaintiffs and its other creditors "—a position the company has not experienced since its "incorporation." In para. 13 it was stated that "if any "creditor is given leave to enforce a judgment against the "company the result will be very harmful to the company's "creditors and disastrous to its shareholders." In para. 15 it was submitted that the company is unable immediately to meet "its obligations" by reason of circumstances directly attributable to the war.

Master Jelf refused to give the plaintiffs leave to proceed to execution on, or otherwise to the enforcement of, the judgment. On appeal by the plaintiffs Oliver J. reversed the decision of Master Jelf and gave the plaintiffs leave to proceed to the enforcement of their judgment.

The defendants appealed. The appeal was heard on October 20 and 23, 1939.

Valentine Holmes for the appellants. Under s. 1 of the Courts (Emergency Powers) Act, 1939 (1), a plaintiff who has obtained judgment for the recovery of a debt must obtain leave from the appropriate Court to proceed to execution or otherwise enforce the judgment: on that application the Court has a discretion to refuse leave if it is satisfied that the defendant is unable to satisfy the judgment by reason of circumstances directly or indirectly attributable to the war. In the present case the judge has construed the section in such a way that he has no discretion but is bound to grant the plaintiffs' application. The question to be decided may be stated shortly thus: Suppose a person owes 10*l.* to each of ten persons, 100*l.* in all, but owing to circumstances directly or indirectly atrributable to the war his assets are reduced to 10*l.* One of the creditors obtains judgment for 10*l.*, and then asks the Court for leave to issue execution on the judgment for 10*l.* Must the Court give the creditor leave because the debtor has 10*l.*, or is the Court entitled to look at all the circumstances, and hold that although the debtor has 10*l.* yet inasmuch as his debts amount to 100*l.* it will not grant leave? Oliver J. has in effect held that the first creditor who obtains a judgment for his debt of 10*l.* has the right to get leave to proceed to execution and so to leave nothing for the other creditors. If that is the true construction of the Act, sub-s. 4 of s. 1 will have no effect. In considering the ability or inability of the defendant to pay the debt one must consider the whole of the debtor's circumstances and not merely his ability to pay one particular debt. A judgment debtor is unable to pay a judgment debt of 10*l.* if he has nine

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(1) The Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 1, provided that no person is entitled, except with the leave of the appropriate Court, to proceed to execution on, or otherwise to the enforcement of, any judgment or order of any Court (whether given or made before or after the commencement of the Act) for the payment or recovery of a sum of money, with certain exceptions

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there mentioned, including in particular any judgment or order for the recovery of a debt becoming due by virtue of a contract made after the commencement of the Act.

Sub-s. 4: "If, on any application for such leave as is required "under this section for the exercise of any of the rights and remedies mentioned in subsections "(1), (2) and (3) of this section, "the appropriate court is of "opinion that the person liable to "satisfy the judgment or order, or "to pay the rent or other debt, or "to perform the obligation, in "question is unable immediately "to do so by reason of circumstances directly or indirectly "attributable to any war in which "His Majesty may be engaged, "the court may refuse leave for "the exercise of that right or "remedy, or give leave therefor "subject to such restrictions and "conditions as the court thinks "proper."

other creditors to whom he owes 10*l.* each and he has only assets amounting to 10*l.*

[SIR WILFRID GREENE M.R. You are asking the Court to construe the section as if it said is unable to pay all his debts.]

During the last great war and in the present war thousands of applications for leave to proceed to execution have been refused when the judgment debtor could, by marshalling all his assets, pay the judgment debt. If the decision of Oliver J. is correct, a debtor whose inability to pay his debts is directly or indirectly due to the war might have to sell his furniture or his clothes in order to pay his judgment debt, even though the result would be that his wife and children would have to starve. That result must follow if the word "unable" in sub-s. 4 is construed so as not to include a case where the debtor can pay the particular debt irrespective of what the debtor's circumstances will be when the debt is paid. In construing "unable" it is necessary to consider what the circumstances of the debtor will be when the debt is paid. There is no real distinction between s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1914, and s. 1, sub-s. 4, of the present Act. A large number of applications were made under the 1914 Act by plaintiffs for leave to issue execution. There were many cases in which the defendants had money in their possession and nevertheless leave to issue execution was refused. Parliament in passing the 1939 Act must have considered that that was the correct construction of the Act. The object of the Act was to prevent a financial situation arising which otherwise was bound to arise on the commencement of the war. The intention of the Legislature was to preserve the existing situation so that no injustice would be done to any person. "Is unable immediately to do so" does not mean that the judgment debtor has no money with which to pay the debt. The defendants have offered to pay all their creditors 25 per cent. of their debts. If the construction which Oliver J. has put upon the Act is correct, the Act will only apply to protect the debtor when he has no money left with which to pay his debts. The defendants cannot pay the judgment debt of 800*l.* to the plaintiffs without disregarding the claims of their other creditors. "Unable to pay" means unable to pay having regard to the whole circumstances of the defendants. The plaintiffs cannot say that the defendants are bound to disregard the claims of their other creditors. The Court will have regard to all the circumstances of the case, and if the defendants are not in a position to pay their debts to all their creditors the Court will refuse to give leave to issue execution. If the view taken by Oliver J. as to the proper construction of the Act is correct it will lead to some very odd results: Suppose a company had a debenture debt and also an unsecured debt which the company was unable to pay. The debenture holder could not enforce his security without going to the Court for leave to do so. On the other hand the unsecured creditor who had obtained a judgment for his unsecured debt would be able to obtain, as of right, leave to proceed to the enforcement of his judgment, and the secured creditor would thus be put in a worse position. In considering the ability of a judgment debtor to pay a judgment debt the Court must take into consideration not only the ability of the debtor to pay the one debt, but also his ability to pay all his other debts. The decision in *Tennants (Lancashire), Ld.* v. *C. S. Wilson & Co., Ld.* (1), did not turn upon the construction of a statute but of a contract. But if the words "or hindrance" were not in the contract it would have been a direct authority in favour of the appellants in the present case. If a debtor is unable to pay the whole of his debts, he is unable to pay each debt. If a defendant is only able to satisfy a judgment debt by realizing all his assets, it is wrong to say as a matter of law that leave must as of right be given to the plaintiff to proceed to the enforcement of the judgment, but the Court before granting leave to the plaintiff to proceed must consider all the circumstances.

R. F. Levy K.C. and *L. Caplan* for the respondents. Sect. 1 of the Courts (Emergency Powers) Act, 1939, puts upon the defendant the burden of proving that owing to circmstances directly or indirectly attributable to the present war he is unable immediately to satisfy the judgment debt. One would expect to find in the affidavit sworn on behalf of the defendants some statement to that effect, but one fails to find such a statement in the affidavit filed in the present case. It would have been easy for the Legislature to have expressly provided what is contended for by the other side, if they had so intended, by saying if the person liable to satisfy the judgment debt is unable to pay his debts. The section does not so provide because that was not the intention of Legislature. What the section does provide is in case the person liable is unable to satisfy the judgment debt. Oliver J. gave the plaintiffs leave to enforce their judgment, because the defendants had enough money to pay this debt although they had not enough money to pay all their debts. The Court in considering whether leave should be granted to enforce the judgment can only take into account the judgment which has been obtained by the plaintiffs, but not the whole of the debtor's financial position.

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(1) [1917] A. C. 495.

[SIR WILFRID GREENE M.R. The policy of the Act is to protect debtors in order to prevent them from being sold up or ejected from their homes. It was not to see that the assets of the debtor should be equally divided among his creditors.]

It was not intended by the Act to set up some alternative to the Bankruptcy Court in order to administer the assets of a defendant company. If a judgment debtor can pay his judgment debt to his judgment creditor, he must do so notwithstanding that the payment will have a deleterious effect on his future business. The affidavit, which has been filed on behalf of the defendants, shows that the defendants will be in a difficulty if they have to pay their debts as they become due, but it does not show that they cannot pay their judgment debts. *Tennants (Lancashire), Ld.* v. *C. S. Wilson & Co., Ld.* (1) is distinguishable from the present case. It turned upon the use of the word "hindrance" in the contract. If the word "hindrance" had not been in the contract and the decision had turned upon the word "prevent" the decision would have been very different. That decision is no authority on the construction of the word "unable" in this statute. The noble Lords in that case pointed out the difference between preventing delivery and hindering delivery. The defendants have to contend that the facts shown in the affidavit have made impossible the payment of their debts. The words used in the statute are clear beyond dispute and they do not mean that the Act applies if the defendants are unable to pay all their debts. The statute only means that the Act applies if the defendants are unable to pay this debt, and that, they have not shown.

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(1) [1917] A. C. 495.

Valentine Holmes replied.

Cur. adv. vult.

1939. Nov. 6. Sir Wilfrid Greene M.R. The judgment which I am about to read is the judgment of the full Court (Sir Wilfrid Greene M.R., Slesser, MacKinnon, Clauson, Goddard and du Parcq L.JJ.).

This is an appeal by the defendants in the action from an order of Oliver J. allowing an appeal from a decision of Master Jelf upon an application by the plaintiffs under the Courts (Emergency Powers) Act, 1939. The action was begun by specially endorsed writ dated September 13, 1939, by which the respondents claimed against the appellants as acceptors the sum of 836*l.* 14*s.* 1*d.* due on certain bills of exchange which had been dishonoured. No appearance to the writ was entered and on September 25, 1939, the respondents signed judgment in default.

On September 26, 1939, the respondents issued a summons under the Courts (Emergency Powers) Act, 1939, for leave to proceed to execution or otherwise to the enforcement of the judgment. By s. 1, sub-s. 1, of that Act no person is entitled, except with the leave of the appropriate Court, to proceed to execution on, or otherwise to the enforcement of, any judgment or order of any Court (whether given or made before or after the commencement of the Act) for the payment or recovery of a sum of money, with certain exceptions there mentioned, including in particular any judgment or order for the recovery of a debt becoming due by virtue of a contract made after the commencement of the Act. Sub-s. 2 provides that no person shall be entitled, except with the leave of the appropriate Court, to proceed to exercise any remedies which are available to him, such as levying of distress or the taking of possession or the entry upon any land or to institute proceedings for foreclosure. To the provisions of this sub-section also there are certain exceptions. Sub-s. 3 provides that no person shall be entitled, except with the leave of the appropriate Court, to proceed to execution on, or otherwise to the enforcement of, judgments or orders for the recovery of possession of land in default of payment of rent with an exception in the case of contracts made after the commencement of the Act.

The crucial provisions are found in sub-s. 4, which we state at length: " If, on any application for such leave as is required "under this section for the exercise of any of the rights and "remedies mentioned in subsections (1.), (2.) and (3.) of this "section, the appropriate court is of opinion that the person "liable to satisfy the judgment or order, or to pay the rent or "other debt, or to perform the obligation, in question is unable "immediately to do so by reason of circumstances directly or "indirectly attributable to any war in which His Majesty may "be engaged, the court may refuse leave for the exercise of "that right or remedy, or give leave therefor subject to such "restrictions and conditions as the court thinks proper."

Sub-s. 5 provides for the case of bankruptcy petitions and winding-up petitions presented against a company on the ground that it is unable to pay its debts. In such cases if the debtor or company proves to the satisfaction of the Court having jurisdiction in those matters that " his or its inability "to pay his or its debts is due to circumstances directly or "indirectly attributable to any war in which His Majesty is "engaged, the court may at any time stay the proceedings "under the petition." We need not refer to any of the other provisions of the Act.

It is clear that where an application is made for leave to proceed to execution or otherwise to enforce a judgment of the kind mentioned, the burden of proving first, that the defendant is unable immediately to satisfy the judgment, and secondly, that that inability arises by reason of circumstances directly or indirectly attributable to the war, lies on the defendant. If he fails to establish these two facts, the discretionary power conferred upon the Court by sub-s. 4 never arises. The question, and the only question, which falls for decision upon this appeal is whether or not the appellants have discharged this burden. Master Jelf held that they had. Oliver J. reversed his decision and held that they had not.

It was suggested by Mr. Valentine Holmes on behalf of the appellants that Oliver J. really decided the matter, not by reference to the particular facts of this case, but according to some general principle which Mr. Holmes maintained was bad in law. Mr. Levy, on behalf of the respondents, did not accept this view as to the grounds of Oliver J.'s decision. If indeed the decision of Oliver J. was based on the grounds suggested by Mr. Holmes, we should not agree with it.

But we do not pause to consider this matter further, since in our opinion, the only question which we in this Court have to decide is whether or not the evidence put forward by the appellants in this particular case brings the case within the sub-section. Mr. Valentine Holmes endeavoured to treat the case as though it could be decided by reference to the bald and insufficient facts of an A. *v.* B. case. We decline so to approach the matter. In our view nothing can be clearer than that each case which falls for decision under the sub-section must be decided in relation to its own particular facts.

The only evidence put forward by the appellants consists of an affidavit sworn by their chairman and managing director. From that affidavit it appears that the appellants' business is that of selling furniture in the main on hire-purchase terms. It shows that the appellants' business has suffered very seriously by reason of the outbreak of war. Receipts from hirers have fallen off. There has been a great decline in the volume of new business, and it cannot be doubted that the appellants have fallen into serious embarrassments. The appellants' finance is conducted by means of loans from finance companies, and the situation can be summarized in three extracts from the affidavit. In para. 11 it is stated that "the accumulated result of these matters is that the company "finds itself without sufficient resources to enable it to discharge "the claims of the plaintiffs and its other creditors—a position "the company has not experienced since its incorporation." In para. 13 it is stated that " if any creditor is given leave to "enforce a judgment against the company the result will be "very harmful to the company's creditors and disastrous to "its shareholders." In para. 15 it is submitted that the company is unable immediately to meet " its obligations " by reason of circumstances directly attributable to the war.

In our opinion these allegations, which summarize the position of the appellants in relation to their creditors, are quite insufficient to establish what sub-s. 4 requires to be established—namely, that they are unable immediately to satisfy this judgment. The affidavit makes no attempt to show that the resources of the appellants are insufficient to enable them to satisfy the judgment which the respondents have obtained against them. There is no exposition of the present actual financial position of the appellants, no statement of their assets, and a quite insufficient statement as to their liabilities.

In our opinion, as a general rule in cases falling under these provisions of the Act, information of this character must be furnished and the decision should be made in the light of all the facts. It is not to be thought from this that, if a judgment debtor is shown to have a sum of cash available to pay the debt, he thereby necessarily fails to establish that he is unable to satisfy it. So to hold would involve giving far too narrow a meaning to the word " unable," which must be construed in a reasonable and commonsense way. Moreover, we must not be taken to be laying it down that the existence of other debts is an irrelevant consideration. On the contrary, it is a matter which may be properly taken into account, although the weight to be given to it may vary very much in different cases. Moreover, in considering the relevance and importance of the fact that other debts exist, it must always be remembered that if and when another creditor obtains a judgment and seeks to enforce it, the position of the debtor, at the date when leave is sought, will have to be considered in relation to that judgment, and that, if and when that eventuality arises, the Court will be able to deal with it in accordance with the directions laid down in the section in the light of the circumstances then existing which may be very different in one direction or the other from those which exist at the date of the application under consideration.

Mr. Valentine Holmes sought to treat the Act as one passed for the benefit of creditors generally, with a view to securing an equal distribution among them of the debtor's available assets, with the result that the Court, in such a case as the present, would become involved in some sort of quasi-bankruptcy administration. As we read the section, its object is not that of the protection of creditors generally, but the protection of debtors against enforcement of judgments obtained against them, although in exercising the jurisdiction, the matters to which we have referred must be taken into account and given proper weight.

In this connection it is not without importance to observe the difference in language between sub-s. 4 and sub-s. 5. In sub-s. 4 the fact which requires to be proved is inability to satisfy the judgment debt in respect of which the application is made. In sub-s. 5 the phrase used is "inability to pay "his or its debts."

Mr. Holmes relied on the case of *Tennants* (*Lancashire*), *Ld.* v. *C. S. Wilson & Co., Ld.* (1) That was a case of a commercial contract, upon the true construction of which—and, in particular, of the word "hindering"—the decision turned, and we derive no assistance from it.

Upon the facts, therefore, which appear in the affidavit, we feel bound to hold that the appellants have not discharged the burden of proof. But, as this legislation is new and the practice to be followed under it has not been settled, we think it right to give the appellants, if they desire it, an opportunity of putting in further and fuller evidence as to their financial position, as they may well have been under a misapprehension as to the sort of evidence required.

(1) [1917] A. C. 495.

If the defendants desire to apply to have the matter sent back to the Master in order to enable them to put in further evidence, we are prepared to give them the opportunity of doing so, but it would be necessary to frame the order so as to safeguard the respondents' interests. It would be most undesirable to permit defendants to gain time by putting in insufficient evidence and then fighting the question of its insufficiency to this Court. If the appellants wish to have such an opportunity, the order will be as follows: Suspend the operation of the order of Oliver J., save as regards costs, for seven days: if during that period the appellants pay into Court the amount of the judgment debt and also a further 50*l.* as a provision towards costs, discharge the order of Oliver J. save as regards costs and refer the summons back to the Master with liberty to the respondents to apply to the Master for leave to enforce the judgment or, in the alternative, for payment to them of the amount of the judgment debt out of the fund in Court, and liberty to the appellants to apply to the Master for leave to file further evidence. Order respondents' costs of this appeal to be paid by the appellants. The effect will be that, in default of payment into Court within the time allowed, the order of Oliver J. will be operative and the respondents will be free to enforce their judgment.

Order accordingly.

Solicitors for appellants: *Simmons & Simmons.*
Solicitors for respondents: *Saunders, Sobell & Greenbury.*

R. F. S.

Applied. Mint v. Good [1951] 1 K. B. 517

Applied. Mint v. Good. [1950] 2 All E.R. 1159.

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Oct. 24; *Nov.* 8.

Nuisance—Adjoining premises—Premises on highway—Failure to repair—Landlord and tenant—Collapse of wall—No knowledge of danger—Liability of landlord.

If, owing to want of repair, premises on a highway become dangerous and constitute a nuisance, so that they collapse and injure a passer-by or an adjoining owner, the occupier or owner of the premises, if he has undertaken the duty to repair, is answerable, whether he knew or ought to have known of the danger or not.

Aliter, if the nuisance is created not by want of repair, but by the act of a trespasser or by a latent defect.

Tarry v. *Ashton* (1876) 1 Q. B. D. 314 reviewed.

St. Anne's Well Brewery Co. v. *Roberts* (1928) 44 T. L. R. 703 is not inconsistent with *Tarry* v. *Ashton*. The dictum in the judgment of Scrutton L.J. at p. 706, that the occupier himself is not liable for nuisance " unless, knowing of the nuisance or being " in such a position that he ought with reasonable care to have " known of the nuisance, he allows it to continue," applies only to the particular facts, and not to cases of nuisance due to want of repair.

Opinion of Goddard J. in *Wilchick* v. *Marks and Silverstone* [1934] 2 K. B. 56 disapproved.

Defendant's Appeal from Sheffield County Court.

The plaintiff was the owner of a lock-up shop in Proctor Place, Sheffield, and the defendant Cohen was the owner of the adjoining house. The defendant had let his premises to a tenant who had occupied them for about two years. On November 24, 1938, the gable end of the defendant's house collapsed owing to a storm, and fell through the roof of the plaintiff's shop.

The plaintiff claimed 61*l.* 17*s.*, the value of repairs executed by him to make good the damage, basing his claim on the ground of (*a*) negligence, and (*b*) nuisance.

According to the evidence the wall at the gable end of the defendant's house had been in defective repair for three years. The pointing and collaring were defective, and there was an outward bulge of the wall. The tenant was under no obligation as between her and the defendant to repair. The defendant admitted that he was liable to repair, and had always done the repairs.

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The county court judge held that the wall was in a defective condition and a nuisance owing to want of repair, and that the defendant was liable to repair and had the right to enter to do repairs, and therefore was under an absolute duty to keep the premises in such a state as not to be a nuisance to the plaintiff, and he entered judgment for the plaintiff for 61*l*. 17*s*. damages and costs. The defendant appealed on the ground that in the absence of proof of knowledge on his part that the premises were in a dangerous state, he ought not to have been held liable.

The appeal was heard on October 24, 1939.

Monier-Williams for the appellant. The rule of law is that the owner is not liable as such for nuisances existing on the premises. There is an exception if the nuisance is due to a breach of covenants of the lease, as when the premises are allowed to fall into a dangerous condition and the owner is liable on a covenant to repair: *Payne* v. *Rogers*. (1) The reason for the immunity of the landlord is to avoid circuity of action where the tenant would have a remedy over against the landlord. In *Pretty* v. *Bickmore* (2) the landlord was held not liable for injury to a passer-by arising from an insecure cellar plate in the footway, the obligation to repair being by the lease cast on the tenant. There *Todd* v. *Flight* (3) was distinguished on the ground that in *Pretty* v. *Bickmore* (2) the landlord did not know of the danger when he let the premises and so had not "authorised the continuance in an "insecure state." *Pretty* v. *Bickmore* (2) was followed in *Gwinnell* v. *Eamer* (4), and Brett J. said in his judgment (5): "If the landlord at the time of the demise knows of the defect, "and does nothing to cause it to be remedied, he may be "liable too. But I doubt very much whether, if the burden "of repair is cast upon the tenant, the duty of the landlord "does not altogether cease." In *Nelson* v. *Liverpool Brewery Co.* (6) Lopes J. defines the two cases in which alone a landlord

(1) (1794) 2 H. Bl. 350.
(2) (1873) L. R. 8 C. P. 401.
(3) (1860) 9 C. B. (N. S.) 377: 30 L. J. (C. P.) 21.
(4) (1875) L. R. 10 C P. 658.
(5) Ibid. 661.
(6) (1877) 2 C. P. D 311.

can be liable for injury to a stranger owing to defective repair of premises let, as follows: "First, in the case of a "contract by the landlord to do repairs, where the tenant "can sue him for not repairing; secondly, in the case of a "misfeasance by the landlord, as, for instance, where he lets "premises in a ruinous condition." Even where there is a covenant by the landlord to repair the tenant cannot make the landlord liable for non-repair until he has given him notice of the defect, for the tenant knows the condition of the premises and the landlord may not: *Morgan* v. *Liverpool Corporation.* (1) The doctrine that the remedy of a third party as against landlord or tenant depends on the contract between them was repudiated by Lawrence L.J. in *St. Anne's Well Brewery Co.* v. *Roberts* (2), and Scrutton L.J. laid down the test of liability as being whether the defendant knew or ought to have known of the nuisance. Here there is no reason to suppose that the landlord let the premises in a dangerous condition or should have known of the state of the wall. The plaintiff's remedy, if any, is against the occupier. *Payne* v. *Rogers* (3) is against me and I do not say that it is no longer good law. But that case, as also *Tarry* v. *Ashton* (4), requires modification in the light of later decisions. The *St. Anne's Well Brewery* case (2) was followed by Luxmoore J. in *Wilkins* v. *Leighton.* (5) In *Wilchick* v. *Marks and Silverstone* (6) landlords were held liable for injury to the plaintiff owing to the fall of a defective shutter from a house when the plaintiff was on the highway. There the landlord had reserved the right to do repairs. To sum up, a landlord in occupation is liable to a member of the public for nuisance arising since the commencement of the lease if he is under a duty to repair and knows of the nuisance. The earlier cases say nothing about knowledge of the nuisance, and that was laid down in the *St. Anne's Well Brewery* case (2), which has been since

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(1) [1927] 2 K. B. 131, 141.

(2) (1928) 44 Times L. R. 703; 140 L. T. 7.

(3) 2 H. Bl. 350.

(4) 1 Q. B. D. 314.

(5) [1932] 2 Ch. 106.

(6) [1934] 2 K. B. 56.

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followed. It is necessary to show knowledge, if the landlord is to be held liable. There is no evidence of negligence on the defendant's part in the present case, and, in the absence of any proof that he knew or ought to have known of the defect, there should be a new trial.

Denis Robson (for *Alastair Sharp* on war service) for the respondent. The landlord here has undertaken the duty of repair and is liable for the nuisance arising from non-repair. It would have been possible to sue the tenant, but he would have had a right of action over and therefore the landlord is rightly sued, to avoid circuity of action. It is not necessary to prove knowledge of the danger as against the landlord: *Tarry* v. *Ashton.* (1) That is only necessary where the nuisance is caused by the act of a third party as in *Barker* v. *Herbert.* (2) The chief case to the effect that knowledge must be proved as against the landlord is *St. Anne's Well Brewery Co.* v. *Roberts* (3), but the passage in the judgment of Scrutton L.J. on which the appellant relies is founded on *Barker* v. *Herbert* (2), and the facts in that case are distinct from those in the present matter, the nuisance being caused by subsidence. Except for *St. Anne's Well Brewery Co.* v. *Roberts* (3) all the authorities support the judgment of the learned county court judge.

Monier-Williams in reply. There is no real distinction between *Barker* v. *Herbert* (2) and the present case. The later cases now represent the law and the earlier cases have been modified to that extent. The plaintiff has neither proved negligence on the part of the landlord nor knowledge of the nuisance and the appeal should be allowed.

Cur. adv. vult.

1939. Nov. 8. The Court (SLESSER and LUXMOORE L.JJ. and ATKINSON J.) dismissed the appeal.

ATKINSON J. read the judgment of the Court, as follows:—

This is an appeal by the defendant from a judgment of the judge of the Sheffield County Court holding him liable for damages done to the plaintiff's shop by the collapse of part of a house belonging to the defendant. [His Lordship stated the facts and continued :] It was admitted that there was evidence on which the judge could find that the defendant had agreed with the tenant to keep the premises in repair and the appeal was argued on that footing. It was also conceded that there was evidence on which the judge could properly hold that the wall of the gable-end of the house had, owing to want of repair, become a nuisance, i.e., a danger to passers-by and adjoining owners. But it is contended for the appellant that these findings do not go far enough to establish his liability for the damage caused by the collapse of the wall. It is said that the defendant is liable only if it is found as a fact that he knew or ought to have known of the want of repair, that the judge did not so find, and that we ought to send the case back for a new trial. It is said that the judge was wrong in holding that the obligation to repair was absolute.

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(1) 1 Q. B. D. 314.
(2) [1911] 2 K. B. 633.
(3) 44 Times L. R. 703.

In our judgment if, owing to want of repair, premises on a highway become dangerous and, therefore, a nuisance, and a passer-by or an adjoining owner suffers damage by their collapse, the occupier, or the owner if he has undertaken the duty of repair, is answerable whether he knew or ought to have known of the danger or not. The undertaking to repair gives the owner control of the premises, and a right of access thereto for the purpose of maintaining them in a safe condition. On the other hand, if the nuisance is created, not by want of repair, but, for example, by the act of a trespasser, or by a secret and unobservable operation of nature, such as a subsidence under or near the foundations of the premises, neither an occupier nor an owner responsible for repair is answerable, unless with knowledge or means of knowledge he allows the danger to continue. In such a case he has in no sense caused the nuisance by any act or breach of duty. I think that every case decided in the English Courts is consistent with this view.

By common law it is an indictable offence for an occupier

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of premises on a highway to permit them to get into a dangerous condition owing to non-repair. It was not and is not necessary in an indictment to aver knowledge or means of knowledge: see *Reg.* v. *Watson.* (1) In *Reg.* v. *Bradford Navigation Co.* (2) Lord Blackburn (then Blackburn J.) laid it down as a general principle of law that persons who manage their property so as to be a public nuisance are indictable. In *Attorney-General* v. *Tod Heatley* (3) it was clearly laid down that there is an absolute duty to prevent premises becoming a nuisance. "If I were "sued for a nuisance," said Lindley L.J. in *Rapier* v. *London Tramways Co.* (4), "and the nuisance is proved, it is no defence "on my part to say and to prove that I have taken all reasonable "care to prevent it."

The first case against the landlord to which I shall refer is *Payne* v. *Rogers.* (5) The head-note in that case is: "If the "owner of a house is bound to repair it, he, and not the "occupier, is liable to an action on the case for an injury "sustained by a stranger from the want of repair." The Lord Chancellor merely said this: "Evidence was given of repairs "being actually done by the landlord. And I thought at the "trial, that though the tenant was prima facie bound to repair, "and therefore liable, yet if he could shew that the landlord "was to repair, then that the landlord was liable." Buller J. said: "The direction of my Lord Chief Justice was most "clearly right. I agree that the tenant as occupier is prima "facie liable to the public, whatever private agreement there "may be between him and the landlord. But if he can shew "that the landlord is to repair, the landlord is liable for "neglect to repair." Heath J. said: "If we were to hold the "tenant was liable in this case, we should encourage circuity "of action, as the tenant would have his remedy over against "the landlord." The point of the decision seems to be this. Liability can be based on neglect by the landlord to perform his covenant to repair. By his covenant he had retained the obligation to repair. That obligation had not been performed, and the question of knowledge did not enter into it.

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(1) (1703) 2 Ld. Raym. 856; 3 Ld. Raym. 18; and sub nom. *Reg.* v. *Watts,* 1 Salk. 357.

(2) (1865) 6 B. & S. 631, 651.

(3) [1897] 1 Ch. 560.

(4) [1893] 2 Ch. 588, 599.

(5) 2 H. Bl., 350.

In *Quarman* v. *Burnett* (1) the question was whether the hirer of a carriage and pair with a driver was liable for the negligence of the driver. Parke B. said (2): "The rule of law "may be, that where a man is in possession of fixed property, "he must take care that his property is so used or managed "that other persons are not injured; and that, whether his "property be managed by his own immediate servants, or by "contractors with them, or their servants. Such injuries are "in the nature of nuisances; but the same principle which "applies to the personal occupation of land or houses by a man "or his family, does not apply to personal moveable "chattels. . . ." *Todd* v. *Flight* (3) was referred to before us, but it has no bearing on the case before the Court. It was an action against an owner who had demised knowing that the premises were in a dangerous condition and without obtaining any covenant to repair.

The next case is *Pretty* v. *Bickmore*. (4) The defendant, the owner, had let premises on a lease with a covenant by the lessee to keep them in repair. The flap over a coal-cellar under the footpath was at the time of the demise out of repair so as to be dangerous and the plaintiff was injured by its giving way. It was held that the defendant was not liable because the duty to repair rested on the tenant. One would have expected to find some reference to the question of the defendant's knowledge, if it was thought to be relevant. It was certainly not found that the defendant knew of the disrepair and no reference was made to his knowledge one way or the other. But Bovill C.J. said this: "In all the cases where "the landlord has been held to be responsible, it will be found that "he has done some act authorising the continuance of the "dangerous state of the premises. The ground of the decision "in *Todd* v. *Flight* (3) was, that the declaration contained an "allegation that the defendant let the houses when the "chimneys were known by him to be ruinous and in danger of

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(1) (1840) 6 M. & W. 499.

(2) Ibid. 510.

(3) (1860) 9 C. B. (N. S.) 377.

(4) L. R. 8 C. P. 401, 404.

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"falling, and that he kept and maintained them in that state." Then Bovill C.J. quotes Erle C.J.: "and thus he was guilty "of the wrongful non-repair which led to the damage, and after "the demise the fall appears to have arisen from no fault of the "lessee, but by the laws of nature." Bovill C.J. proceeds: "That is wholly inapplicable to the present case." Therefore, it looks as if the defendant there was not being deemed guilty of negligence, yet the judgment of Bovill C.J. concluded with these words: "If the duty of repairing had "rested upon the landlord, no doubt he would have been "liable." Keating J. said the same thing—that the landlord would have been liable if he had retained the obligation to repair the premises. Both the learned judges seem to be stating that view quite regardless of any question of the knowledge of the landlord.

Gwinnell v. *Eamer* (1), which was referred to in argument, was an action on the case in which the landlord had let with a covenant by the tenant to repair. It does not throw any light on the case before this Court.

Perhaps the most important case for our consideration is *Tarry* v. *Ashton.* (2) It is necessary to examine this case with care, and particularly the judgment of Blackburn J. *Tarry* v. *Ashton* (2) has in a number of later cases been, in our view, misunderstood. The facts there were simple. The plaintiff was walking along the Strand in front of the defendant's house in November, 1874, when a large lamp suspended from the front of the house fell on her and injured her. A man was blowing water out of the gas-pipes. He had placed his ladder against the lamp-bracket. It slipped and the man fell. The lamp got shaken and its fastenings broke. In the preceding August the✓ defendant, who had only lately become the tenant of the house, knowing that the lamp and other fittings were of some age, employed an experienced fitter to examine them and put them in thorough repair. After the accident examination showed that the breakage was caused by the general decay of the connections. The jury found that the defendant was not negligent and had no knowledge of the want of repair, but that the fitter

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(1) L. R. 10 C. P. 658.

(2) 1 Q. B. D. 314.

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was negligent. Judgment was entered for the plaintiff with leave to the defendant to move to enter a verdict for the defendant or for a non-suit. At the date of the accident in November it is clear that the defendant had no knowledge whatever of the defective condition of the lamp and did not even suspect it. It could not be said, and it was not said, that he ought to have known of its condition, as a competent fitter had just been employed to make sure that the lamp was in thorough repair. But the lamp was in fact in a dangerous condition, it was a nuisance, and the defendant was held liable.

Unfortunately, the head-note in the case is inaccurate. I will not read the first paragraph, but I will come to what I think is the inaccuracy: "Held, that the plaintiff was entitled to the "verdict. By Lush and Quain JJ., on the ground that if a "person maintains a lamp projecting over the highway for his "own purposes, it is his duty to maintain it so as not to be "dangerous to the passengers; and if it causes injury "owing to want of repair, it is no answer on his part that he had "employed a competent person to repair it. By Blackburn J., "on the ground that, under the circumstances of the case, "it was shewn that defendant knew that the lamp wanted "repair in August, and it was his duty, therefore, to put it in "reasonable repair, and the person he employed having failed "to do so, defendant was liable for the consequences of the "breach of duty." It is perfectly plain from the facts of the case that, so far from it being shown that the defendant knew that the lamp wanted repair in August, the contrary was the fact.

Blackburn J. said (1): "It appears that the defendant came "into occupation of a house with a lamp projecting from it over "the public thoroughfare, which would do no harm so long as it "was in good repair, but would become dangerous if allowed to "get out of repair. It is therefore not a nuisance of itself. But "if the defendant knowingly maintained it in a dangerous "state he would then be indictable for the nuisance. This much "is clearly decided in *Reg.* v. *Watson*." (2) That statement would be true without the word "knowingly." *Reg.* v.

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(1) 1 Q. B. D. 318.

(2) 2 Ld. Raym. 856; 1 Salk. 357, sub nom. *Reg.* v. *Watts*.

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Watson (1) is certainly not an authority for requiring the insertion of that word. "This much," says Blackburn J., "is "clearly decided by *Reg.* v. *Watson* (1), for the defendant was "there held liable for not repairing his house which was on a "highway and was ruinous and like to fall down, on the ground "that as occupier he was bound to keep the house so as not "to be a nuisance. As I have said, I do not wish to decide "more than is necessary; and if there were a latent defect in "the premises, or something done to them without the knowledge of the owner or occupier by a wrongdoer, such as "digging out the coals underneath and so leaving a house near "the highway in a dangerous condition, I doubt—at all events, "I do not say—whether or not the occupier would be liable"—foreshadowing the decision in *Barker* v. *Herbert* (2), decided some thirty-five years later. "But if he did know of the defect, "and neglect to put the premises in order, he would be liable." That is, of course, referring to the kind of defect which Blackburn J. has just mentioned—a latent defect, or a defect due to somebody else's action. "He would be responsible to this "extent, that as soon as he knew of the danger, he would be "bound to put the premises in repair or pull them down. So "also the occupier would be bound to know that things like "this lamp will ultimately get out of order, and, as occupier, "there would be a duty cast upon him from time to time to "investigate the state of the lamp. If he did investigate, and "there were a latent defect which he could not discover, I doubt "whether he would be liable; but if he discovers the defect and "does not cure it, or if he did not discover what he ought on "investigation to have discovered, then I think he would "clearly be answerable for the consequences. Now in the "present case there is ample evidence that in August the "defendant was aware that the lamp might be getting out of "repair, and, it being his duty to put it in repair, he employs "Chappell to do so. We must assume, I think, that Chappell "was a proper person to employ; and I may observe that he "was clearly not the defendant's servant, as the jury say, but

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(1) 2 Ld. Raym. 856; 1 Salk. 357, sub nom. *Reg.* v. *Watts.*

(2) [1911] 2 K. B. 633.

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"an independent contractor. But it was the defendant's duty "to make the lamp reasonably safe, the contractor failed to do "that ; and the defendant, having the duty, has trusted the "fulfilment of that duty to another who has not done it. "Therefore the defendant has not done his duty, and he is "liable to the plaintiff for the consequences. It was his duty "to have the lamp set right ; it was not set right."

Why was it "the defendant's duty to make the lamp safe" ? Blackburn J. does not say it was his duty because he was aware that the lamp might be getting out of repair, merely that the defendant had the duty. Surely it was not his duty because he gave his mind to the question of the safety of his premises and, wishing to ensure that safety, employed a contractor to examine and do all that might be necessary. He could not be in a worse position than if he had not given the matter a thought, and, therefore, had not had anyone to examine and do what was necessary. The learned judge must have meant that he was under a duty because, as an occupier, he was bound to keep his premises, including the lamp, from becoming unsafe for want of proper repair. That duty was not performed and, therefore, he was liable, despite the absence of negligence or knowledge. The learned judge contrasted the position of a nuisance due to want of repair with that of a nuisance due to a latent defect or an act of trespass. Lush and Quain JJ. rested their judgments on an absolute obligation to prevent one's property from becoming a nuisance. There is no question about that.

There is an interesting note in the 14th ed. of Pollock on Torts, p. 417, on *Tarry* v. *Ashton.* (1) We are told in the preface to that edition that the late Sir Frederick Pollock had collected many notes for his next revision. The footnote is as follows : "On the modern view, *Tarry* v. *Ashton* (1) is properly "treated as a case of nuisance. Pollock's note proceeded: "The decision in *Tarry* v. *Ashton* (1) is right because "there was no evidence that the defendant knew of the "danger." The editor then adds : " this would, it is submitted, "be more accurately expressed 'that the defendant knew

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(1) 1 Q. B. D. 314.

"'*or ought to have known* of the danger.'" Then again (quoting from Pollock's note): "I fail to see any real "difference of opinion among the judgments in *Tarry* v. "*Ashton.* (1) Lush and Quain JJ. were not considering the "possibility of a latent defect." We have there an opinion of great value that all the three judges in *Tarry* v. *Ashton* (1) decided that there was an absolute duty on the occupier of premises adjoining the highway to keep them in sufficient repair to prevent them becoming a danger. Blackburn J. further drew the distinction between want of repair and act of trespass or latent defect.

The next case is *Nelson* v. *Liverpool Brewery Co.* (2) That was an action against owners who had let a house to a tenant with no agreement on either side as to the repair of the main walls, roof and main timbers. Owing to want of repair, a chimney-pot fell and injured the plaintiff, a servant of the tenants, and it was held that the plaintiff was not entitled to recover against the owners, although they had ample notice of the want of repair. I refer to the case because of the following passage. The judgment of the Court, which consisted of Denman and Lopes JJ., was delivered by Lopes J., who said this (3): "We think there are only two ways in which land-"lords or owners can be made liable, in the case of an injury "to a stranger by the defective repair of premises let to a "tenant, the occupier and the occupier alone being prima facie "liable; first, in the case of a contract by the landlord to do "repairs, where the tenant can sue him for not repairing; "secondly, in the case of a misfeasance by the landlord, as, for "instance, where he lets premises in a ruinous condition." In the first case there mentioned there is no suggestion at all of the necessity of proving knowledge or means of knowledge on the part of the landlord.

The next case is *Harrold* v. *Watney.* (4) There a fence round the defendant's land adjoining the highway was in want of repair and a child of four climbed on to it and fell. There was no finding that the owner knew or ought to have known of the defective condition of the fence which was found to be a nuisance. The judgment in the court of first instance had been given for the defendant, and the plaintiff appealed and succeeded. There was no suggestion there from first to last that the defendant's knowledge had any relevance whatever to the question of his liability. The whole discussion was on whether the duty to maintain the fence in a safe condition extended to making it safe even if children climbed on it to look over.

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(1) 1 Q. B. D. 314.
(2) (1877) 2 C. P. D. 311.
(3) 2 C. P. D. 313.
(4) [1898] 2 Q. B. 320.

In Salmond on Torts, 9th ed., there is an interesting note on this case (p. 512): "The occupier is liable of course for "wilful or negligent acts of misfeasance whereby he obstructs "the highway or renders it dangerous, and he is also liable "for maintaining his adjoining premises in such a dangerous "condition as to constitute a nuisance to the highway: "*Harrold* v. *Watney*." (1) There is no suggestion there that knowledge, or means of knowledge, has any relevance.

Palmer v. *Bateman* (2), an Irish case, is the only authority inconsistent with the view which the Court holds. The plaintiff was injured by a piece of gutter from the roof of the defendant's house falling on her as she was passing along the street. The action was against the occupier for damages and it failed. It was based on negligence and negligence was negatived by the jury. On appeal it was sought to rest on nuisance, and *Tarry* v. *Ashton* (3) was relied on. The effect of *Tarry* v. *Ashton* (3) was completely misrepresented by counsel who said that Blackburn J. based his judgment on the defendant's knowledge of the nuisance, and that this view was not dissented from by the other judges. Lord O'Brien L.C.J. said: "The point decided in *Tarry* v. *Ashton* (3) "was that the owner of a house which, to his knowledge, was "in a dangerous condition, could not free himself from responsi-"bility by employing a contractor who was apparently "competent, but failed to put things right." Wright J. actually said that the judgment of all three members of the Court was that the defendant with knowledge of the defect could not escape liability by shifting the responsibility on to

(1) [1898] 2 Q. B. 320.
(2) [1908] 2 I. R. 393.
(3) 1 Q. B. D. 314.

the shoulders of the contractor. Such a misrepresentation of what was decided in *Tarry* v. *Ashton* (1) must tend to reduce the value, in English Courts at any rate, of the decision in *Palmer* v. *Bateman.* (2)

In *Barker* v. *Herbert* (3) the defendant was the owner in possession of an empty house in a street with an area adjoining the highway. Some boys broke away a part of the railings guarding the area with the result that the plaintiff, a child, fell into the area. He sued the owner for damages. The jury found that the area was at the time of the accident a nuisance, but that the defendant did not know that the rail had been moved and that sufficient time had not elapsed to enable him to have known of it if he had used reasonable care. Judgment was given for the defendant. The plaintiff appealed and it was contended on his behalf that the defendant's duty to have his premises safe was absolute and without any limitation. It would have been the easiest thing in the world for the Court to say, if they had so thought, that an occupier of premises could never be liable for the premises becoming a nuisance without proof of knowledge or means of knowledge. But all that was decided in very carefully chosen language was that he was not liable if the dangerous state of the premises was due to the act of a trespasser and not to any default of the occupier or those for whom he was responsible, unless he neglected to abate the danger for an undue time after he became or ought to have become aware of it. Vaughan Williams L.J. (4) recognized the duty of a person where premises abut on the highway to maintain them in such a condition as not to constitute a danger or nuisance. Fletcher Moulton L.J. said (5): "The possessor of land adjoining "a highway may not cause his premises to be a nuisance." It is clear, I think, that the word "cause" as there used should be read as "cause or by breach of duty permit." Fletcher Moulton L.J. continues: "In a case where the "nuisance is created by the act of a trespasser, it is done

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(1) 1 Q. B. D. 314.
(2) [1908] 2 I. R. 393.
(3) [1911] 2 K. B. 633.
(4) [1911] 2 K. B. 637.
(5) Ibid. 642, 643.

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"without the permission of the owner and against his will, "and he cannot in any sense be said to have caused the "nuisance." He then went on to deal with a continuance of the nuisance when the occupier knows or ought to have known of it. Farwell L.J., dealing with the contention that an occupier is under an absolute obligation at all times and in all circumstances to prevent a nuisance, said that a land owner was not liable for a nuisance caused not by his own action but by something done by another person against his will. I think it is clear that by the words " own action " the learned Lord Justice must have meant " own action or default." He refers to *Tarry* v. *Ashton* (1), saying, as I think inaccurately, that Blackburn J. based his judgment on knowledge by the defendant that the lamp was out of repair. But, for all that, it seems to me that the decision in *Barker* v. *Herbert* (2) was in complete harmony with the views of Blackburn J. If the nuisance is due to the occupier's failure to keep in repair there is liability. If it is due to the act of a trespasser there is no liability without proof of subsequent culpable neglect.

In *Pritchard* v. *Peto* (3) the plaintiff went to a house owned and occupied by the defendant to collect money due. While standing on the doorstep a piece of cornice fell from the house on his head. It was found that the defendant did not know of the defect nor ought to have known of it. It was due to decay. The defendant was held not liable. Bailhache J. said that in *Tarry* v. *Ashton* (1) the Court had held that it was the defendant's duty to make the lamp reasonably safe, that he had not done his duty, and that he was therefore liable for the consequences. He held in the case before him that the plaintiff was in the position of an invitee and that the duty was only the same as that owed to the plaintiff in *Indermaur* v. *Dames* (4) which was that the owner of a house must take reasonable care to keep it in such a state of repair as not to expose the plaintiff to any hidden danger of which the owner was aware or ought to

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(1) 1 Q. B. D. 314.
(2) [1911] 2 K. B. 633.
(3) [1917] 2 K. B. 173.
(4) (1866) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311.

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have been aware, adding these important words "quite a "different duty from that owed by the defendant to the "plaintiff in *Tarry* v. *Ashton*." (1)

In *Noble* v. *Harrison* (2) a branch of a tree growing on the defendant's land overhanging the highway thirty feet above the ground broke and fell on the plaintiff's motor coach. The plaintiff claimed damages, but failed because the fracture was due to a latent defect not discoverable by any reasonably careful inspection, which defect was, of course, unknown to the defendant. The claim was based on nuisance. The county court judge had found for the plaintiff. The Divisional Court reversed the decision. Rowlatt J. said (3): "The result of ". . . . the cases is that a person is liable for a nuisance "constituted by the state of his property: (1.) if he causes it; "(2.) if, by the neglect of some duty, he allowed it to arise; and "(3.) if, when it has arisen without his own act or default, he omits "to remedy it within a reasonable time after he did or ought "to have become aware of it." He distinguished *Tarry* v. *Ashton* (1) by saying that in that case there was an absolute duty to maintain the lamp safely, but there was no such duty with regard to a tree. In our opinion, that is a correct statement of the law. Wright J. agreed. In dealing with *Tarry* v. *Ashton* (1) he was, I venture to think, clearly mistaken in saying that the plaintiff was entitled to judgment on the ground of negligence because the defect was not observed owing to the negligence of the defendant's servant employed to inspect it. Negligence was in fact negatived, and Blackburn J. in terms said that the person employed was not a servant but a contractor. But Wright J. went on to say that Lush and Quain JJ. had held that there was an absolute duty to keep the lamp in repair and that Blackburn J. thought that for a latent defect the occupier would not be liable. Adopting that view, confirmed by the principle laid down in *Barker* v. *Herbert* (4), he held that the defect in the branch was clearly latent and that the defendant was therefore not liable in the absence of knowledge or means of knowledge.

(1) 1 Q. B. D. 314.
(2) [1926] 2 K. B. 332.
(3) [1926] 2 K. B. 338.
(4) [1911] 2 K. B. 633.

St. Anne's Wells Brewery Co. v. *Roberts* (1) was much relied on by the appellant. The defendants were the owners, but not the occupiers, of part of the old city wall at Exeter, which fell on the plaintiff's inn. When they let the property there was no reason to suppose the wall was unsafe, nor could the defendants by any reasonable diligence have ascertained that it was unsafe. They had not undertaken any obligation to repair. It was held by the Court of Appeal, overruling Acton J., that the plaintiffs had failed to bring their case within the principles of *Todd* v. *Flight* (2) and that there was no liability. Scrutton L.J. agreed that the wall was a nuisance, but went on to ask: Who was the occupier? After saying that the defendants were not the occupiers, he said: "I think also it is "clear law that the person liable for nuisance on premises is "surely the occupier." Then follows the passage, only obiter, which has been relied on so strongly by the appellant: "I "think also it has been established by authority binding on "this Court—I refer to *Barker* v. *Herbert* (3) . . . . that the "occupier himself is not liable if he did not create the nuisance "on the land which he occupies unless, knowing of the nuisance "or being in such a position that he ought with reasonable care "to have known of the nuisance, he allows it to continue, and "perhaps he is not liable even then. . . . If Wilson [the "occupier] had been sued for nuisance . . . . I think the "question to be determined in his case would have been: "Did you know that there was a nuisance? Ought you with "the exercise of reasonable care to have known there was a "nuisance? And if both these questions were answered in "the negative, there would have been no liability on the "occupier."

This passage, based as it is on *Barker* v. *Herbert* (3) must, we think, be interpreted with reference to the facts of the case then before the Court. The plaintiff's house came right up to the wall and the plaintiff or his predecessors had excavated out of the city wall recesses for use as cupboards. It was found that that was partly responsible for the collapse and that the

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(1) 44 Times L. R. 703.
(2) 9 C. B. (N. S.) 377.
(3) [1911] 2 K. B. 633.

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other contributing cause was a gradual washing away of the soil under the foundations. The fall was due, to quote Scrutton L.J., "to as latent a defect as you could expect any "defect to be." There was no want of repair of the wall itself except to put right the excavations made either by the plaintiff himself or by his predecessors, and the case was typical of that contemplated by Blackburn J. in *Tarry* v. *Ashton* (1) and by the Court in *Barker* v. *Herbert.* (2) It was a nuisance due partly to the acts of a trespasser and partly to a latent defect under the foundations, and not to any want of repair. We are satisfied that Scrutton L.J. was thinking only of the case with which he was dealing and that he had no intention of laying down anything inconsistent with *Tarry* v. *Ashton* (1) and other cases dealing with nuisance due to want of repair.

In our view, the opinion expressed by Goddard J. in *Wilchick* v. *Marks and Silverstone* (3) is not accurate. It was unnecessary for the decision of the case before him but he used words which were relied on by the appellant in the case before us. He referred to *Payne* v. *Rogers* (4) and said that that case had been approved in *Rex* v. *Pedly,* (5) *Todd* v. *Flight,* (6) *Pretty* v. *Bickmore* (7) and *Nelson* v. *Liverpool Brewery Co.* (8) and that those cases established that where a landlord had assumed an obligation to repair he is liable to a person injured through disrepair though to that must now be added that the plaintiff must prove that the landlord had knowledge of the state of disrepair. The learned judge relied on *Morgan* v. *Liverpool Corporation* (9) and *St. Anne's Wells Brewery Co.* v. *Roberts* (10) in support of the proposition that knowledge is necessary. That statement of law in so far as it requires knowledge on the part of the landlord, in our view, is not in accordance with *Tarry* v. *Ashton* (1) and the other cases to which I have referred. *Morgan* v. *Liverpool Corporation* (9) was a case between tenant and landlord. It was based on breach of duty to repair and it was held, in very carefully chosen language, that, as between the tenant and the landlord, the landlord was entitled to notice from the tenant of the disrepair complained of before he could be sued for breach of duty. That case has no bearing on an issue between occupiers and owners who are under an obligation to repair and the public. I have already expressed the view that the passage in the judgment of Scrutton L.J. in the other case relied on refers only to cases of latent defect and not to want of repair.

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(1) 1 Q. B. D. 314.
(2) [1911] 2 K. B. 633.
(3) [1934] 2 K. B. 56.
(4) 2 H. Bl. 350.
(5) (1834) 1 Ad. & E. 822.
(6) 9 C. B. (N. S.) 377.
(7) L. R. 8 C. P. 401.
(8) 2 C. P. D. 311.
(9) [1927] 2 K. B. 131.
(10) 44 Times L. R. 703.

There is only one other case to which I ought to refer and that is another Irish case: *Mullan* v. *Forrester*. (1) The defendants were the owners of a dye works in Belfast. In 1910 the works were closed down and nothing in the way of repair was thereafter done. In 1920 notices were served on the defendants to take down such portions of the building as were dangerous. In consequence of those notices the defendants took down the roof and the walls other than the street wall, which was then left without any support. In a storm it fell and killed three people, and the action was for damages under Lord Campbell's Act. The jury negatived negligence and the trial judge refused to put to the jury the question whether the wall was a nuisance, although nuisance had been pleaded, and he gave judgment for the defendants. The plaintiffs applied to the Court of Appeal for a new trial on the ground that if the wall were a nuisance they were entitled to judgment although the jury had found that the defendants did not know nor ought to have known it was dangerous. A new trial was ordered, Moore J. dissenting. Pim J. expressed the opinion that the evidence was altogether in favour of the view that the wall became a nuisance from the time the roof and side walls were removed, acts done by the defendants, and that the defendants' knowledge of the danger was immaterial. It would seem consistent with this view that a nuisance caused, not by a positive act, but by neglect to perform a positive duty, should impose a similar liability without proof of knowledge or means of knowledge. Gordon J. took the same view—indeed, he was prepared to enter judgment for the plaintiffs on the ground that the

(1) [1921] 2 I. R. 412.

evidence was conclusive that the wall was made dangerous by the removal of the side walls and roof and that the defendants' knowledge was immaterial. Although *Barker* v. *Herbert* (1) was not cited, he pointed out that, if the wall became a nuisance owing to the act of a third party or to some event which no one could foresee, knowledge would be material. Moore J. dissented. He thought that the findings of the jury cleared the defendants of having done any act to cause the danger, that he was not, therefore, the author or creator of the danger, and, that he had not wrongfully suffered the wall to continue in a dangerous condition. He considered the question of the necessity of proving knowledge and came to the conclusion that Blackburn J. had decided in *Tarry* v. *Ashton* (2) that where a defendant is sued as occupier of the land on which a nuisance exists and not as its original creator, if the subject-matter were not a nuisance originally, he ought not to be made liable for it unless he has knowledge and is in default. With the greatest respect to the learned judge, Blackburn J. decided no such thing. Ashton had no knowledge and had been cleared of all negligence. He was liable because his duty to keep in repair had not in fact been performed. Moore J. also thought that the defect in the wall was latent.

In our opinion, the view of the majority of the Court was in accord with the English cases. The principle laid down by the majority of the Court was this. If premises become dangerous as the result of something done by an occupier and they cause damage, the occupier is liable although he did not know of the danger and was not negligent in not knowing. That principle is in harmony with the principle laid down in *Tarry* v. *Ashton* (2), that if premises become dangerous as a result of failure to repair and cause damage the occupier is liable, although he did not know of the danger and was not negligent in not knowing. Positive acts and neglect of duty are thus placed on the same footing. On the other hand, if premises become dangerous, not by the occupier's act or neglect of duty, but as the result of the

very old in custom
view of rent of
what dist. dif.?

Check: safety of premises each time he collects rent!

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(1) [1911] 2 K. B. 633.

(2) 1 Q. B. D. 314.

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act of a third party, or of a latent defect, the occupier is not liable without proof of knowledge or means of knowledge and failure to abate it.

In our view this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Hyman Stone & Co., Sheffield.*

Solicitors for respondent: *Doyle, Devonshire & Co., for Irwin Mitchell, Kershaw & Co., Sheffield.*

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HAILE AND OTHERS *v.* WEST.

Costs—County court—Remitted action—Joinder of plaintiffs—Payment into Court—Recovery of more than 50l. in aggregate but less individually—Scale of costs—County Courts Act, 1934 (24 & 25 *Geo.* 5, *c.* 53), *s.* 73—*County Court Rules,* 1936, *Order* XLVII., *r.* 5.

An action for damages for negligence was begun by three co-plaintiffs in the High Court and remitted to the county court. The defendant paid into Court 25*l.*, 35*l.* and 5*l.* respectively, in satisfaction of their claims. The county court judge in giving leave for payment out, treated the amount recovered as over 50*l.* and ordered payment of costs on Scale C:—

Held, following *Davies* v. *Davies* [1928] 1 K. B. 364, that the County Courts Act, 1934, s. 73, gave the county court judge no wider discretion as to costs in remitted actions than he had in actions originating in the county court.

Held, also, following *Gallivan* v. *Warman* [1930] W. N. 96, that, as each of the plaintiffs had a separate cause of action, the amounts recovered should not be aggregated, but that the scale of costs applicable was the lower scale appropriate to the amount recovered by each plaintiff individually, in accordance with the County Court Rules, 1936, Order XLVII., r. 5.

APPEAL from Lambeth County Court.

Early in 1939 the plaintiff, Robert Haile, his wife, Florence Haile, and his infant son, Allan Haile, brought an action in the High Court against the defendant West for damages for negligence. The action was remitted to the county court on the usual allegation of need for security. On June 1, 1939, the defendant paid into court sums of 25*l.*, 35*l.*, and 5*l.*, in satisfaction of the three claims respectively. The action was settled and the matter came before the county court judge for approval of payment out under Order XI. of the County Court Rules. The judge agreed to the payment out, and made an order for the plaintiffs' costs on the High Court scale up to the date of remission, and thereafter on Scale C. From this order as to costs the defendant appealed on the ground that after remission the scale applicable was not Scale C, but Scale B in the case of the plaintiff and his wife, and the Lower Scale, col. 1, in the case of the infant, and that the judge should have so ordered. There was no certificate by the judge for costs under Order XLVII., r. 13, and it was not suggested that the order could be supported on the basis of that rule.

Platts Mills for the defendant (appellant). The county court judge was wrong in aggregating the amounts recovered and in ordering costs on Scale C. Each plaintiff is entitled to costs on the scale appropriate to the actual amount recovered by him: Order XLVII., rr. 5 and 6, of the County Court Rules, 1936: *Gallivan* v. *Warman*. (1) No wider discretion is given to the judge in the case of remitted actions than in other actions: *Davies* v. *Davies*. (2) The discretion as to costs given to the judge by the County Courts Act, 1934, s. 73, is subject to the provisions of s. 47, sub-s. 1.

Parnell Kerr for the plaintiffs (respondents). The true test of the scale of costs to be applied lies in the amount recovered in the action. The County Courts Act, 1934, s. 73, gives the county court judge a full discretion over the whole costs in transferred actions subject to Order XLVII., r. 9, of the County Court Rules, 1936. *Gallivan* v. *Warman* (1) is not against this view. Its real meaning is that sums recovered by co-plaintiffs cannot be aggregated so as to deprive the county court judge of his discretion as to costs. It was assumed in *Davies* v. *Davies* (2) that Order LIII., rr. 17-19, of the old rules, now Order XLVII., r. 6, of the County Court Rules, 1936, applied to remitted actions. But that is wrong and Order XLVII., r. 9, is the rule as to costs applicable to remitted actions. It is true that this rule envisages a specific amount claimed, and here the damages are at large, but in such a case it must be assumed that more than 50*l*. is claimed. *Davies* v. *Davies* (2) is only concerned with scales of costs. If, however, this is wrong, Order XLIX., r. 1, of the County Court Rules applies the Interpretation Act, 1889, s. 1, to these rules so that a "plaintiff" in Order XLVII., r. 6, sub-r. 1, includes "plaintiffs." An action by co-plaintiffs is one action with one judgment and one order as to costs: compare the Rules of Supreme Court, Order XVI., r. 1, and *Viscount Gort* v. *Rowney*. (3) A consolidated action is wholly different. There separate judgments are appropriate.

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(1) [1930] W. N. 96.

(2) [1928] 1 K. B. 364.

(3) (1886) 17 Q. B. D. 625.

Platts Mills in reply. The Act of 1934, s. 74, says that after remission to the county court the proceedings shall be "as "if . . . . originally commenced in that county court." This includes the determination of the scale of costs to be applied.

SLESSER L.J. [after stating the above facts :] The question now before the Court has regard to the order for costs made by the county court judge in giving leave for this money to be paid out to the plaintiffs. The order which he made was that the costs should be on the High Court scale down to the date of remission and thereafter on Scale C. There is in this appeal no complaint of so much of that order as refers to the High Court scale of costs down to the date of remission, but it is said that the county court judge had no power to award costs on Scale C.

It is to be observed that the learned judge did not purport to give costs on Scale C by granting any certificate. Under Order XLVII., r. 13, there is power in any proceeding in which the judge certifies that a question of law of importance was involved for him to award costs on such scale as he thinks fit. In the present case he has not purported to do that, nor is there any suggestion that his award of costs on Scale C can be supported on the basis of that rule.

The judge had recourse to Order XLVII., r. 5, sub-r. 2, and came to the conclusion that he was entitled to award costs on the basis that the sum paid in exceeded 50*l.*, in which case the scale applicable, in the absence of some special order, would be Scale C. If the three amounts paid in be aggregated, the total sum is more than 50*l.* But if they be not so aggregated, then according to the scale of costs under Order XLVII., r. 5, neither the father's, nor the mother's, nor the child's costs could be on Scale C. The mother and the father are in the category exceeding 20*l.* and not exceeding 50*l.* The infant is in the category exceeding 2*l.* and not exceeding 5*l.*, Lower Scale, col. I.

This appeal, therefore, resolves itself into the question whether the county court judge was entitled to aggregate these amounts so as to create a product which would carry costs on the highest scale. The case cannot be dismissed merely by saying that it is a matter within the judge's discretion. If he has not exercised his discretion judicially, then, although the matter be one of costs only, according to *Donald Campbell & Co., Ld.* v. *Pollak* (1), and other well known authorities, this Court has power to deal with the matter.

In my opinion, the judge has erred in law in aggregating these sums. The plaintiffs are in reality three separate complainants. They may, under the Rules of the Supreme Court, Order XVI., r. 1 (which are the rules first to be looked at here, since it was in the High Court that this action was started), be joined in one action as plaintiffs "in whom any "right to relief is alleged to exist in respect of the same "transaction or series of transactions, whether jointly, severally, "or in the alternative," and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief. It is quite clear, however, when the history of those Procedure Rules is considered, that it is only by a process of machinery that these plaintiffs are so to be joined. Each of them has a separate right. If several persons each claim in respect of an accident, the eventual liability may vary, because in each case there is to be considered the question of the negligence of the defendant towards a particular plaintiff, together with the damage sustained by each injured person.

The respondents are driven to admit that, if they had elected to proceed separately in separate actions, and had taken no steps to consolidate their actions, judgments obtained in the three separate actions would have been unimpeachable. It is indeed more a matter of convenience for the purpose of pleading that the rules have now been devised as they have, and also for the purpose of economy to encourage joinder and consolidation. The principle, however, remains unimpaired—that each of those persons, has, in law, a separate cause of action.

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(1) [1927] A. C. 732.

It is argued for the respondents, in the first place, that where an action is ordered to be transferred from the High Court to the county court, the costs are in the discretion of the court to which the proceedings are transferred. That argument has already been before the Divisional Court in *Davies* v. *Davies*. (1) Mr. Kerr is perfectly entitled to say that this Court is not bound by that decision, although it is in fact a decision of two Lords Justices, Atkin and Lawrence L.JJ., sitting as a Divisional Court. That was a case where a claim by the plaintiff had been remitted to the county court, and a contention, identical in principle with that which was raised here, was discussed, and the very argument which is here presented to us was put forward—namely, that s. 12 of the old Act of 1919 (now s. 73 of the County Courts Act, 1934) gave the judge an unfettered discretion in the case of a remitted action which possibly he would not have had under the provisions of Order XLVII., r. 5, dealing with scales of costs applicable in case of actions started in the county court.

If that contention were right, it could equally be argued that the county court judge would also have an unfettered discretion where proceedings are begun in one county court and transferred to another. Atkinson J., however, pointed out in the course of the argument that, if that were so, a discretion would arise which would not do so if the case was started in the particular county court in which it was heard—a peculiar result, but one from which this Court would not flinch if it were a true view of the law. But, as Atkin L.J. pointed out with great clarity (2), that argument is not well-founded because " it was not intended to give the county court judge "larger or further powers " than he would otherwise have had. "The object of the section" (which is now s. 73 of the Act of 1934), he says, " was to determine who was to exercise the "discretion." Then : " Take the case of a plaint filed in the "wrong court. It would be anomalous that in such a case the "Act should give a wider or larger discretion to the judge to "whose court the action was transferred. It was not intended

(1) [1928] 1 K. B. 364. (2) Ibid. 366.

"that the transferee should have a wider discretion as to "costs." Atkin L.J. concludes that s. 12 of the Act of 1919 must be read in conjunction with s. 119 of the County Courts Act, 1888. It follows that the discretion is limited as in that Act, which now finds expression in Order XLVII., r. 13. Lawrence L.J. gave judgment to the same effect.

In my view *Davies* v. *Davies* (1) was correctly decided. I should have come to the same conclusion had that case been before this Court for consideration. That being so, the discretion in this remitted action is no more and no less than it would have been if the action had been started in the county court. One comes, therefore, to this question: Is it right, having regard to the question of principle which I have mentioned as to the real nature of these causes of action, to aggregate them? It has already been decided, again by two Lords Justices sitting as a Divisional Court, in *Gallivan* v. *Warman* (2), that such an aggregation is in principle improper.

There is no available report giving the actual judgment, only a condensed statement in the Weekly Notes. Nevertheless, by analogy on the reasons given, we are told that both in the High Court and in the county court, the principle laid down by that decision has been adopted ever since and that the kind of aggregation which has here been sought to be made by the county court judge is contrary to practice.

In *Gallivan* v. *Warman* (2) the plaintiffs, who were husband and wife, brought an action in the High Court against the defendant for damages for negligence in driving a motor-car, whereby the wife was injured. The action was transferred to the county court, and the defendant paid into court 45*l.* to meet the wife's claim and 5*l.* to meet the husband's claim, which sums the plaintiffs accepted. The county court judge refused to make an order for High Court costs on the ground that the plaintiffs had recovered less than 50*l.* The actual decision of the county court judge there was rather on the question of High Court costs than on the question of costs on Scale C in the county court, but the principle is the same.

(1) [1928] 1 K. B. 364.

(2) [1930] W. N. 96.

Scrutton L.J. said: "It was argued by Mr. White that the "two sums were to be added together." The learned Lord Justice had said previously: "In the present case 45*l.* and 5*l.* "had been paid in to meet the respective claims of the plaintiffs, "and each had recovered 'less than 50*l.*' so as to fall within "the scope of s. 11." Then he says: "The section appeared "to refer to one judgment—namely, judgment for the amount "recovered by one plaintiff." I concurred in that judgment. The Court decided that it was wrong in such a case to aggregate and the reason must have been the same as that which moves me to come to the conclusion to which I come in the present case—namely, that the scale of costs now be upon the footing that each individual has brought a separate action.

The only question outstanding seems to be what scale ought, on the principles which I have suggested, to be applied. I have already indicated that in my view, in respect of the 25*l.* and the 35*l.*, the proper scale of costs that should have been applied under Order XLVII., r. 5, is Scale B, and with regard to the infant the proper order ought to have been the Lower Scale, col. 1. This appeal, therefore, succeeds.

Luxmoore L.J. I agree.

Atkinson J. I agree. The county court judge has decided that the plaintiffs were entitled to an award of costs on Scale C. He took the view that, this action being a transferred action, he had complete discretion under s. 73. If the action had been started in the county court, it is quite clear that he would have had no unfettered discretion. He could only give costs on Scale C if he certified under Order XLVII., r. 13. It would have been impossible to give a certificate under that rule in a case of this sort and no certificate was in fact given. But the county court judge took the view that, under s. 73, he had an unfettered discretion. *Davies* v. *Davies* (1) was not cited to him, but that case makes it clear that his discretion in a transferred action is the same as that which he would have if the action had been started in the county court. It

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(1) [1928] 1 K. B. 364.

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is open to us, if we thought it wrong, to overrule *Davies* v. *Davies* (1), but I think it is right and the argument of Atkin L.J. quite unanswerable. I agree that the appeal succeeds.

Appeal allowed.

Solicitors for appellant: *L. Bingham & Co.*
Solicitors for respondents: *Schultess-Young & Co.*

F. P. F.

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(1) [1928] 1 K. B. 364.

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Nov. 16, 17.

PETRIE *v.* MAC FISHERIES, LIMITED.

Master and servant—Contract of service—Illness of servant necessitating temporary absence from work—Servant's right to wages during sickness—Knowledge of servant that employer would pay half-wages for limited period—Act of grace—Whether implied term of contract of service to pay wages.

There is no general principle of law that in every case a servant is entitled to wages during temporary absence through sickness. By the terms of his contract, express or implied, he may disentitle himself to such rights as he might otherwise possess.

Decision of Court of Appeal in *Marrison* v. *Bell* [1939] 2 K. B. 187 discussed and explained.

Appeal from the Mayor's and City of London Court.

On January 26, 1930, the plaintiff, Samuel George Petrie, entered the service of the defendants, Mac Fisheries, Ld., as a smoker-packer in their fish smoking department, at a weekly wage of 2*l.* 15*s.* In February, 1930, his wages were increased to 3*l.*, and in July, 1935, to 3*l.* 2*s.* 6*d.* per week. In 1926 the defendants had posted in their works a notice stating that workmen who were temporarily absent through sickness would be allowed half their weekly wages for a period up to three weeks in any one year as an act of grace on the part of the employers and not as a right. This notice had apparently never been brought to the attention of the plaintiff, and it was not proved that he had ever seen it, but he admitted his knowledge of the arrangement. On occasions of two weeks in 1933 and ten days in 1936, the plaintiff was absent from work by reason of sickness, and on each occasion he received and accepted half-pay. In July, 1938, he was again ill, and he received half-pay for five weeks up to September 3. On September 24, at his own request, he received a week's holiday with full pay. He did not return to work until January, 1939, and as he was then only able to do light work, which the defendants were unable to give him, they terminated his employment. In March, 1939, the plaintiff commenced the present action, claiming 82*l.* 17*s.* 10*d.* being wages for twentv-eight weeks, less the sums already received as an act of grace, and one week's wages in lieu of notice.

Judge A. R. Thomas gave judgment for the plaintiff. He said: "There was a contract of service and it had not been "terminated. The result of the decision in *Marrison* v. *Bell* (1) "is that unless the defendants can raise something else the "plaintiff is entitled to his wages, subject to deduction of what "he has already received."

The defendants appealed. The appeal was heard on November 16, 17, 1939.

A. T. Miller K.C. and *Moelwyn Hughes* for defendants. On the facts found the judge ought to have held that it was an implied term of the plaintiff's contract that no wages were payable to him during his absence through illness. In any event, the plaintiff could not be heard to say that that was not a term of the contract. Alternatively, the plaintiff's contract of service was frustrated by his illness and consequent absence. Where an employer employs a servant at a weekly wage which is paid for work to be done day by day, the whole basis of the contract between the parties is that the servant shall be available to do the work. Two or three days' interruption of the work may not avoid the contract, but if an interruption goes to such a length that the employer must enter into a contract in substitution for that with the servant in question, the basis of the original contract is destroyed by the inability of the servant to do his part under the contract. Where a servant working under a contract such as that under consideration is aware of a practice adopted by the employer, which provides for a special rate of payment during illness, and for the duration of that payment, the ordinary common law rules entitling the employee to wages during sickness are abrogated by the implied term which is introduced into the contract of service. This case is distinguishable from *Marrison* v. *Bell* (1) where the only question decided was whether the effect of the National Health Insurance Acts was to modify the terms of a contract of service at common law.

Weitzman for the plaintiff. It has long been settled that a

(1) [1939] 2 K. B. 187.

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contract of service is not terminated by the servant's incapacity to work by reason of temporary illness, and that on return to work the man can recover his wages during the period of his absence [per Lord Cozens-Hardy M.R., in *Warburton* v. *Co-operative Wholesale Society, Ld.* (1), approved by Scott L.J. in *Marrison* v. *Bell* (2): see also the headnote to *Warburton's* case (1)]. The evidence before the judge below established that the plaintiff was engaged as a weekly servant, and in the absence of proof of any special condition he had a common law right to recover his full wages. The onus is on the defendants to prove to the satisfaction of the Court that the terms of the ordinary contract of service at common law have been varied by agreement between the parties. Mere proof of knowledge by the plaintiff of the notice in the present case is not sufficient. There must be proof of acquiescence by the workman, and this the defendants have failed to produce.

SLESSER L.J. In this case the plaintiff sued the defendant company for the sum of 82*l.* 17*s.* 10*d.* for twenty-eight weeks' wages and a week's wages in lieu of notice. The basis on which those wages are claimed is that they are due to the plaintiff in respect of a period when he was temporarily sick, but still in the employment of Mac Fisheries, Ld.

In such a case it is necessary at the outset to determine what are the terms of the contract between this man and his employers. It has been argued that there is a general principle of law that where a man is employed on a weekly service and is not paid in respect of specific work done he is entitled to receive wages during a period of incapacity through illness because of the faithful service which either he has performed or which he would have performed but for his illness. In support of this contention reliance is placed on the recent decision in *Marrison* v. *Bell* (2), citing Lord Cozens-Hardy in *Warburton* v. *Co-operative Wholesale Society, Ld.* (1) In *Marrison's* case (2) it is stated, in the headnote, that "Illness of a servant, which, "while it lasts, incapacitates him for the performance of his

(1) [1917] 1 K. B. 663, 665.

(2) [1939] 2 K. B. 187.

"duties, but is not so long-continued or so serious as to terminate "the contract of service, does not at common law suspend his "right to wages under the contract." The headnote takes that form because in *Marrison* v. *Bell* (1) there was no question of any specific or implied arrangement concerning sickness. The contract in that case was silent on the point. Nor did the question whether the contract was of that order where the right to wages may depend on the specific work done as affecting rights during sickness arise. As I read *Marrison* v. *Bell* (1), it was assumed that it was a case of a contract of service without more.

The real contention in *Marrison* v. *Bell* (1) was whether, if during illness the servant receives benefit under the National Health Insurance Act, it does or does not deprive him of his right to wages under the contract of service while sick, assuming that he is entitled to them during that period. The error has crept into some people's minds that, apart from this important question of the effect of the National Health Insurance Act, *Marrison* v. *Bell* (1) purported to lay down a new principle of law. In my opinion, it does nothing of the kind. Scott L.J., who gave the judgment of the Court, cited *Cuckson* v. *Stones* (2), and *Warburton's* case (3), which deal with unqualified service, but I find nothing in that judgment, which is directed primarily to the question of the effect of the National Health Insurance Act, to suggest that it purports to, or does in fact, lay down any new principle of law.

In the present case it is said that the plaintiff's service was of the type contemplated in *Marrison* v. *Bell* (1)—that is an agreement without any special provision as to sickness and that therefore the plaintiff was entitled to wages during temporary incapacity. The case here is not quite so simple. The plaintiff entered into the defendants' employment in 1930, at the wage of 2*l*. 15*s*. a week. Before his employment a notice had been put up by the employers in the place where he worked, and, I suppose, in other places, to this effect: "Camden Town "Staff. Allowance during absence due to sickness or accident.

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(1) [1939] 2 K. B. 187.
(2) (1858) 1 El. & El. 248.
(3) [1917] 1 K. B. 663.

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"Commencing April 24, 1926, the undermentioned allowances "will be made when men are absent: 1. During sickness: "Half-pay commencing from the first day's absence, up to a "total of 21 days per annum. No allowance after." Then follows this rider: "These allowances are purely an 'Act of "'Grace' on the Company's part, and cannot be claimed as a "'right.' The above applies to men with over six months' "service with the Company." Had the evidence been that the plaintiff when he entered into the employment in 1930, knew and acquiesced in these terms, I think there could have been but little doubt that, whatever rights he may have had when no question of any term as to what was to happen when he was ill had been raised, he would have disentitled himself to rely on any such implication, because the notice seems to be inconsistent with a right to receive pay during sickness. True it is that it is stated that the allowances are an act of grace, and cannot be claimed as a right. If the plaintiff had accepted the allowances on that basis, it would be difficult to reconcile that with his having agreed by implication —of course, if there had been an express agreement, it would be quite different—to receive wages during sickness as a right. One asks oneself whether this payment, made under an act of grace, would be set off against the wages, or whether, when he was ill, he would be in the fortunate position that he would get his wages and half his wages again in the form of this ex gratia payment, or whether he would be only entitled to receive half his wages. I think the implication which one would be entitled to draw would be that the ex gratia payment would be in substitution for any right which he might otherwise have. However that may be, Mr. Weitzman is perfectly right in saying that the evidence proves conclusively, or at any rate it satisfied the judge, that the plaintiff never had his attention drawn to the notice at all. He behaved at all times as if he knew of the notice, but it was never brought to his attention, and possibly was not even in existence at the time when he went into the works in 1930.

[His Lordship then recited the facts, and the evidence of the plaintiff's knowledge of the "half-pay" in sickness arrangements,

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and continued:] In my opinion the evidence on this matter being all one way, the plaintiff has, by his own evidence, stated that all he could get, in his opinion, in 1933, in 1936, and in 1938, was half-pay ex gratia when he was ill. If he had made an arrangement that when he was ill he was to take half-pay, it seems to me to negative any presumption that he was working on the terms that he was to get wages while he was temporarily sick. By the terms of his contract he disentitled himself to any such right to wages during sickness as he might otherwise possess.

I pass to consider the judgment of the judge. He says this: "Well, if it had been established that the position was "that the defendants intended to contract with their "employees in this particular part of their premises on "those terms"—that is, that they should receive the ex gratia payment—"and that that should be a binding "contract, I think it might be possible to find that the plaintiff "had accepted those terms, and I should have been very glad "to have been able to find so . . . . But it has not been "proved that it was intended by the defendants even to be a "term of the contract." But that is to misconceive the position. The plaintiff argues: "I am entitled to these wages "by reason of an implied term in my contract that I should be "paid during sickness." His evidence is that he got all that he could get, and that gratuitously. He never asked for more. He never thought to ask for more, for all he could hope to get in 1933, in 1936, and in 1938, was an ex gratia payment his employers had given him. The fact of its gratuitous nature negatives any legal obligation.

I have come to the conclusion, therefore, that there was no evidence on which the judge could find that a contract had been made between the plaintiff and the defendants to remunerate him so as to entitle him to the wages during sickness.

Consequently this appeal succeeds.

DU PARCQ L.J. I have come to the same conclusion. I have no doubt, now that we have heard the matter fully

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argued, that the judge's error was a mistake of law. I think he formed a wrong opinion of the result of the decision in *Marrison* v. *Bell.* (1) There is a passage in the judge's judgment where he says this : "What is the position so far ? "There was a contract of service and it had not been terminated. The result of the decision in *Marrison* v. *Bell* (1) "is that unless the defendants can raise something else the "plaintiff is entitled to his wages, subject to deduction of "what he has already received." The judge appears to have thought that when once a contract of service is proved one must assume, without more, that the workman is entitled to his wages during temporary illness. It is interesting to see that the judge says " subject to deduction of what he has already "received," which means, I take it, subject to deduction of certain ex gratia payments. I say this parenthetically, because it shows that the judge did not think it possible to say that the plaintiff was entitled to his full wages in addition to the gift, which on one view he has received, of a sum equivalent to half his wages. I thought at one time that Mr. Weitzman was suggesting that the view put forward by his client, or on behalf of his client, and possibly adopted by the judge, was that the plaintiff should get his full wages in addition to those ex gratia payments. The words of the judge which I have quoted enable one to dismiss that from one's mind.

I quite see, looking again at *Marrison* v. *Bell* (1), and at the case which was there cited of *Warburton* v. *Co-operative Wholesale Society, Ld.* (2), that if a reader of the report of *Marrison* v. *Bell* (1) confines his attention to one sentence and reads it divorced from its context, and without relation to the subject-matter, he may come to a wrong conclusion as to what the case decided. It is true that *Marrison* v. *Bell* (1) adopted and approved the observations of Lord Cozens-Hardy in the *Warburton* case (2), which, when they were spoken by Lord Cozens-Hardy, were, I think, merely dicta and not binding on the Court. It is true, if you look at the single sentence which was cited by Scott L.J. (3) : "'It has been long settled

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(1) [1939] 2 K. B. 187.
(2) [1917] 1 K. B. 663.
(3) [1939] 2 K. B. 201.

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"' that a contract of service is not terminated by incapacity to "' work by reason of temporary illness, and that on return to "' work the man can recover his wages during the period of his "' absence,'" that in citing it he pointed out, as was perfectly correct, that the words were unlimited and unqualified. It was right to point out in *Marrison* v. *Bell* (1) that no qualification was introduced by Lord Cozens-Hardy, because so far as *Marrison* v. *Bell* (1) was concerned it was material to notice that no such qualification was introduced or suggested as would have prevented those words from applying to the particular facts of that case, and I venture to say with great respect that Lord Cozens-Hardy said nothing inaccurate in that statement if it is read by somebody who does not expect to find in a short sentence a complete statement of the whole law. Lord Cozens-Hardy was stating a general proposition, which I believe to be accurate, and I think it is clearly this : If you have a weekly hiring of a servant without more, and with nothing in the terms of it, whether they are expressed or implied, to suggest that during temporary absence through illness he is not to be paid, then you may assume that he is to be paid, and that it was the intention of the parties that he should be paid.

I only hope that, in saying that, I have not said something which, again taken from its context, may lend colour to arguments which I certainly do not intend my words to support. I think that the longer one's experience becomes—and mine is short—of exercising appellate jurisdiction, the more one is impressed by the fact that a great deal of difficulty is caused by a failure to read the whole of a judgment or to read it in relation to the circumstances, and by the sometimes useful, but often only temporarily advantageous, method of taking one sentence from a judgment or a headnote in order by the skilful use of it to persuade a judge to do something which no judgment, read as a whole, can possibly support. Nobody can read those words of Lord Cozens-Hardy's—and it would have been a matter of distress to him if he had thought they could—without realizing that, like all statements of a general rule, it is subject to exceptions.

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(1) [1939] 2 K. B. 187.

The first thing to remember is that one must find out what the contract is. It is plain that Lord Cozens-Hardy did not mean that every contract of service, whatever terms were contained in it, must result in a liability to pay a workman during the time that he is ill. The terms in the contract may be express, or they may be implied. You may have a custom. It appears in one of the cases that there is a custom that agricultural labourers are not paid during the time they are off work through illness. It would be idle in such a case to assert that Lord Cozens-Hardy said that under a contract of service the servant must always be paid wages during his absence through illness. Apart from express terms, or terms imported through some well known custom, the terms may obviously be implied in other ways. I do not dwell on that, because in this case, when the whole of the facts are looked at, it seems to me plain—and I think that if the judge had not attached undue importance, as I think he must have done, to the isolated passage from *Marrison* v. *Bell* (1) to which I have referred, he could have come to no other conclusion—that there was here, at the material time in 1938, a contract, one of the terms of which was that during absence through illness the workman was to have no right to any remuneration whatever. It is, in my view, impossible to draw any other conclusion from the facts.

Suppose that in 1938 the plaintiff had not known of the defendants' intention to pay him nothing except an ex gratia payment for a portion of the period of his absence through illness, and suppose that, let us say on a Monday, the defendants, being under an obligation to employ him until the end of the week and thereafter unless they give him a week's notice and the week's notice came to an end, had said to him: "We shall "not pay you anything if you are away ill." Suppose that at that stage he had said: "I do not agree to that at all and I will "not work for you on those terms." If on Tuesday he had fallen ill and had been away for two days I do not think that the

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defendants would have been entitled to say: "We are going "to deduct something from your wages in respect of those two "days." They would have been entitled to say: "If you are "not prepared to work for us in the future on these terms, we "will give you a week's notice," and if the plaintiff had said: "Very well, I agree. I quite understand that if I am ill I shall "have no right to remuneration at all," and had gone on working for them, nobody could suggest that because originally, when his employment began, no such term was agreed that term had not become a part of the agreement.

In effect, when one looks at the substance of the matter, that is what happened in this case. If you assume that the plaintiff is a reasonable man—and if I do not assume that I am quite unable to put any construction at all on the conduct of the parties—he knew, as he admits that he knew, long before 1938, that if he was away ill he would not be paid a penny as of right. It is not suggested that he thought, when he was paid ex gratia, that he was still entitled to wages over and above the ex gratia payment. He knew that it was the intention of the firm to pay him nothing whatever as of right if he was ill, and he knew that it was on that footing that the defendants understood that they contracted with him. If one finds that, knowing that, he makes no objection and makes no claim for wages, but goes back to work, and accepts, as he later did, an increase in his wages, it appears to be quite impossible for him to say that he did not agree to work for the defendants on the footing that that was a term of the contract.

It is impossible for us, as it seems to me it would have been impossible for the judge had he correctly applied the law, to come to any other conclusion than that at the material time in 1938 it was as much a term of the contract between the plaintiff and the defendants that he should have no right to remuneration during illness as if that term had been embodied in a written contract, executed in solemn form by both parties.

I want to make it quite clear, in case any words of mine are misunderstood, that I do not rest that in any way upon the doctrine of estoppel. For reasons which I do not think it necessary to go into, I see many reasons against making any use here of the doctrine of estoppel against the plaintiff. I simply say that the facts, proved or admitted, prove beyond doubt that at the material time it was a term of the contract that the plaintiff should not be entitled to any payment during his absence through temporary illness. That does not mean that the employment terminated. It means no more than what I have said, and that is quite enough for the decision of this case. I agree that this appeal should be allowed.

ATKINSON J. I agree. In my opinion, the judge misdirected himself and addressed his mind to the wrong question. I think that he began to go wrong when he said: "What is the "position so far? There was a contract of service and it had "not been terminated. The result of the decision in *Marrison* "v. *Bell* (1) is that unless the defendants can raise something "else the plaintiff is entitled to his wages, subject to deduction "of what he has already received." Thereafter he dealt with the case, as I think, as if the plaintiff started as a matter of law with the right to wages during sickness and retained that right until he had given it up for some good consideration, and as the ex gratia payment would not, in the view of the judge, amount to good consideration in law, the right remained. To quote his final words, "nothing happened to do away with the "plaintiff's legal rights." I think that explains why the judge dealt so fully with the question whether it had become a term of the contract that the plaintiff should have half-wages during sickness as of right. He held, very properly, that the half-wages was never more than an ex gratia payment, and never became a matter of contractual right. Of course, it never did. The real question was whether or not it was a term of the plaintiff's contract of employment that his wages should be paid during sickness. The defendants said that it was a term of the contract that wages should not be paid during sickness, but that they were ready, not as a matter of right, but ex gratia, to pay a man half-wages for twenty-one days.

(1) [1939] 2 K. B. 187.

I think the judge's view was based on a misconception of the meaning of a passage in the judgment of Scott L.J. in *Marrison* v. *Bell*. (1) The passage was this: "Those cases say, "in my opinion quite clearly, that under a contract of service, "irrespective of the question of the length of notice provided "by that contract, wages continue through sickness and "incapacity from sickness to do the work contracted for until "the contract is terminated by a notice by the employer in "accordance with the terms of the contract." It is quite true that that principle is laid down without any reference to, or any limitation depending on, the terms of the contract of employment, but it is quite obvious that there must be read into it some such words as " subject to any express or implied "term in the contract to the contrary." It cannot be thought that the Lord Justice meant that statement to apply to a contract where there was an express term to the contrary, and his comments on *Niblett* v. *Midland Railway Co.* (2) again show quite clearly that he was excepting the case where there was an implied term to the contrary. It cannot be thought that his general statement was meant to apply to such contracts, for example, as those in the weaving industry, where the amount of wages payable depends on the quantity and quality of the work done: see *Sagar* v. *H. Ridehalgh & Son, Ld.* (3) Nor can it be suggested that it was meant to apply to contracts where, by the custom of the industry, wages are payable only for services rendered, as with agricultural labourers, or as, apparently, in the mining industry. The latter was dealt with by Greer J. in *Browning* v. *Crumlin Valley Collieries, Ld.* (4), where he said: "The consideration " for work is wages, and the consideration for wages is work. " Is it to be implied in the engagement that the wages are to be " paid when through no fault of the employer the work cannot be " done?" The question must depend, as is indicated in the notes to *Cutter* v. *Powell* (5) (Smith's Leading Cases, 13th ed., vol. ii., p. 49), on the terms of the contract. " The right to wages

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(1) [1939] 2 K. B. 198.

(2) (1907) 96 L. T. 462; 23 Times L. R. 240.

(3) [1931] 1 Ch. 310.

(4) [1926] 1 K. B. 522, 528.

(5) (1795) 6 T. R. 320.

"depends upon whether the consideration therefor has been "performed." It is submitted in the notes to that case, as I think rightly, that it must be ascertained from the contract whether the consideration for the payment of wages is the actual performance of the work, or whether the mere readiness and willingness, if of ability to do so, is the consideration.

In my opinion, Scott L.J. said nothing in *Marrison* v. *Bell* (1) which was inconsistent with that submission. It must be remembered that the passage to which I have referred followed a reference to what the county court judge had said, namely: "When off sick, in the absence of any express contract, no "wages due." I think the Court of Appeal meant that the truer view was the other way round, and that where there is nothing in the contract, expressed or implied, to the contrary, the consideration for wages is not the actual doing of the work contracted for, but the readiness and willingness, if of ability, to do the work. If that view is right, the judge below should have asked himself the comparatively simple question: "Did the terms on which the plaintiff was employed in 1938 "exclude the right to wages if through illness he did no work?" If he had asked himself that question, he could have answered it only in one way. Instead of dealing with that question he assumed that the plaintiff had had a legal right to wages which, he said, the plaintiff had never given up. In truth, there was no such right. For years the plaintiff had known and assented to the terms on which the defendants employed their men. It never entered his head that he was employed on any other terms, or that he was entitled to be paid for work which he had not done, until he heard of *Marrison* v. *Bell* (1), from somebody who misunderstood it. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for the appellants: *Simpson, North, Harley & Co.*
Solicitor for the respondent: *F. G. Millward.*

(1) [1939] 2 K. B. 187.

A. W. G.

SOWLER *v.* POTTER.

1939
Nov. 3, 6, 23.

Landlord and tenant—Lease—Avoidance—Misrepresentation as to identity of tenant—Fraud.

On May 12, 1938, the defendant, under the name of A. M. R., which was then hers, was convicted of permitting disorderly conduct in a café. In June, 1938, under the name of A. P., she approached the plaintiff to negotiate a lease of premises in the same neighbourhood with a view to conducting a restaurant therein. On July 4, 1938, she assumed the name of A. P. by deed poll. On August 4, 1938, the plaintiff granted her the lease she desired. In an action by the plaintiff for a declaration that the lease was void, possession of the premises, and damages for trespass and use and occupation on the ground that she had been deceived as to the identity of the defendant:—

Held, that the consideration of the person with whom the plaintiff was entering into the lease was a vital element in that agreement so that, the plaintiff having been mistaken with regard to the identity of the defendant, the lease was void ab initio.

Dictum of Viscount Haldane in *Lake* v. *Simmons* [1927] A. C. 487, 501, applied.

ACTION tried by Tucker J. without a jury.

The plaintiff, Helen Josephine Sowler, claimed from the defendant, Ann Potter, possession of a room in the basement of 74, Coleman Street, E.C., whereof the defendant, by a lease dated August 4, 1938, purported to become the plaintiff's tenant with a view to conducting a restaurant therein. The plaintiff also claimed a declaration that the lease was void, and damages for trespass and use and occupation and fraudulent misrepresentation.

The plaintiff alleged that on May 12, 1938, the defendant, under the name of Anna May Robinson, was convicted at Guildhall Police Court of permitting disorderly conduct in the Swan Café, Great Swan Alley, E.C., and that, when approaching the plaintiff to negotiate the lease in June, 1938, and subsequently when entering into the lease, she fraudulently concealed that fact from the plaintiff, so that the plaintiff was deceived as to her identity and was willing to let her the premises which, if she had been aware of her identity, she would not have done.

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By her defence the defendant admitted that she was convicted on May 12, 1938, but said that on July 4, 1938, by deed poll, she had assumed the name of Ann Potter, and she denied all the allegations made by the plaintiff.

Weitzman for the defendant. The plaintiff is not entitled to succeed since there was no such mistake of fact on her part or fraudulent misrepresentation on the part of the defendant as would avoid the lease. The plaintiff intended to contract with the de facto physical individual who called herself Ann Potter and, therefore, the contract is not void: per Viscount Haldane in *Lake* v. *Simmons*. (1) There was no such error as to the de facto individual with whom the plaintiff was contracting as would avoid the contract: per Horridge J. in *Phillips* v. *Brooks, Ld.* (2); and on that ground this case is distinguishable from *Bolton* v. *Jones* (3), where the defendant thought that he was dealing with one individual and in fact was dealing with another. There was, moreover, no fraud committed by the defendant to induce a contract as there was in *Gordon* v. *Street*. (4) The defendant may have intended to deceive, but what she did at most amounted to a representation which was collateral to the contract. Even if the defendant, when entering into the lease, intended that the premises should be used for an unlawful purpose, the lease is not thereby rendered invalid but the interest in the premises remains legally vested in her: *Feret* v. *Hill* per Jervis C.J., Maule and Cresswell JJ. (5); *Alexander* v. *Rayson* per curiam. (6)

Granville Sharp for the plaintiff. The mistake as to the identity of the defendant was fatal to the lease. In view of the class of premises being let and the purpose to which they were to be put, the character of the lessee was such a fundamental element of the agreement that error with regard to it destroys the plaintiff's consent and annuls the agreement: per Viscount Haldane in

(1) [1927] A. C. 487, 501.
(2) [1919] 2 K. B. 243, 248.
(3) (1857) 30 L. T. (O. S.) 188.
(4) [1899] 2 Q. B. 641.
(5) (1854) 15 C. B. 207, 224, 225, 226.
(6) [1936] 1 K. B. 169, 184, 186.

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Lake v. *Simmons* (1), *Cundy* v. *Lindsay.* (2) The revelation of the defendant's true identity would have shown her to be suspect in the very capacity which was material—namely, that of the tenant of a restaurant. In concealing her identity to persuade the plaintiff to deal with her she was just as guilty of fraudulent misrepresentation inducing the contract as was the plaintiff in *Gordon* v. *Street.* (3) [He also referred to *London Jewellers, Ld.* v. *Attenborough.* (4)]

Cur. adv. vult.

1939. Nov. 23. TUCKER J. [stated the facts and continued :] The way in which the case is put on behalf of the plaintiff is this. It is said that the plaintiff, through her agent, was mistaken with regard to the identity of the person with whom the lease was made. It is furthermore said, though this would not be essential to that part of the case, that in fact that mistake was brought about by the fraud of the defendant, Potter, in concealing her identity and representing that she was a different person from that which she was. Accordingly, it is said that the lease is void ab initio and that everything which has been done under it is also void, so that the defendant was at all times a trespasser and must be dealt with as such.

That part of the case raises considerations which are not free from difficulty. I think that the law on the subject is to be found set out in Viscount Haldane's speech in *Lake* v. *Simmons* (5) where he said : "Jurists have laid down, as "I think rightly, the test to be applied as to whether there is "such a mistake as to the party as is fatal to there being "any contract at all, or as to whether there is an intention "to contract with a de facto physical individual, which "constitutes a contract that may be induced by misrepresenta-"tion so as to be voidable but not void. It depends on a "distinction to be looked for in what has really happened. "Pothier (Traité des Obligations, s. 19) lays down the

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(1) [1927] A. C. 501.
(2) (1878) 3 App. Cas. 459.
(3) [1899] 2 Q. B. 641.
(4) [1934] 2 K. B. 206.
(5) [1927] A. C. 487, 501.

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"principle thus, in a passage adopted by Fry J. in *Smith* v. "*Wheatcroft* (1): 'Does error in regard to the person with "'whom I contract destroy the consent and annul the "'agreement? I think that this question ought to be "'decided by a distinction. Whenever the consideration "'of the person with whom I am willing to contract enters "'as an element into the contract which I am willing to "'make, error with regard to the person destroys my consent "'and consequently annuls the contract, . . . On the "'contrary, when the consideration of the person with "'whom I thought I was contracting does not enter at all "'into the contract, and I should have been equally willing "'to make the contract with any person whatever as with "'him with whom I thought I was contracting, the contract "'ought to stand.'" Then he went on: "In the careful "judgment delivered by him in *Phillips* v. *Brooks* (2), "Horridge J. decided that the alternative view secondly stated "by Pothier applied to the case he was dealing with. A "fraudulent person had entered a jeweller's shop and looked "at and selected certain jewels which the jeweller was "prepared to sell to him individually as a casual customer "who had entered the shop. All that remained to be sub"sequently arranged was payment of the price. The unknown "customer, who drew a cheque pretending to be some one "else, and signing it in a well-known name, was allowed in "exchange for the cheque to take away one of the jewels, "of which he disposed subsequently. Horridge J. found "as a fact, that though the jeweller believed the person to "whom he handed the jewel was the person he pretended "to be, yet he intended to sell to the person, whoever he was, "who came into the shop and paid the price, and that the "misrepresentation was only as to payment. There was "therefore consensus with the person identified by sight "and hearing, although the title to delivery was voidable as "having been induced by misrepresentation. In the other "type of case referred to by Pothier, where the belief of the "contracting seller depends wholly on identity of character

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(1) (1878) 9 Ch. D. 223, 230.

(2) [1919] 2 K. B. 243.

"or capacity, there is, as Mr. Justice Holmes says at the "beginning of the Ninth lecture in his book on The Common "Law, no contract, because there is really only one party."

I think that it is clear that the present case is one where, in the words quoted by Lord Haldane, "the consideration of "the person with whom I am willing to contract enters as an "element into the contract which I am willing to make," and that it is to be distinguished from the type of case with which Horridge J. was dealing in *Phillips* v. *Brooks* (1), where those considerations did not arise. I think that this case of landlord and tenant is clearly one where the consideration of the person with whom the contract was made was a vital element in the contract, and that, therefore, if there was any mistake on the part of the plaintiff with regard to the identity of the person with whom she was contracting, the contract is void ab initio.

Here, I think, there was mistake on the part of the plaintiff with regard to the identity of the person with whom she was contracting. The agent, Mr. Tong, who acted on behalf of the plaintiff, said in his evidence that he remembered the case of Mrs. Robinson having been reported in the newspapers. Therefore, he was aware that there was in existence a Mrs. Ann Robinson, a convicted person, and he thought when he entered into this contract with the defendant that he was entering into a contract with some person other than the Mrs. Ann Robinson who had been convicted. I think it is quite immaterial to embark on speculation whether or not, if the defendant had called herself Mrs. Robinson, he would have discovered who she was. That is another matter altogether. He believed that, whoever he was contracting with, it was not the Mrs. Ann Robinson who had been convicted of this offence a short time beforehand.

The facts are, therefore, very similar to those in *Gordon* v. *Street*. (2) It is quite true that the decision of the three members of the Court in that case was that the fraudulent concealment by the plaintiff of his identity with a person whose reputation in business was such that the defendant would not have

(1) [1919] 2 K. B. 243. (2) [1899] 2 Q. B. 641.

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dealt with him was material to the inducement which brought about the contract so that the defendant was entitled to repudiate that contract within a reasonable time after the discovery of the fraud, but A. L. Smith L.J. said (1) after quoting the passage from *Smith* v. *Wheatcroft* (2) which was referred to by Lord Haldane in *Lake* v. *Simmons* (3) " Now, the "advertisement above mentioned points out that George "James Addison, with whom the defendant thought he was "contracting, was not as ordinary loan offices were, and that "he traded at one-tenth of the interest charged elsewhere, "and this appears to me to afford evidence that with a man "trading as Addison said he did the defendant was willing to "contract, and that the consideration of the person did enter "into the contract, and upon this ground, apart from fraud, "the contract ought not to stand." It is to be observed that in that case the defendant was aware of the existence of a notorious moneylender named Gordon, and when he made the contract with the plaintiff in the name of Addison he did not think he was contracting with that Gordon. In those circumstances A. L. Smith L.J. based his decision on the ground that the contract could not stand because, apart from fraud, there was this element of mistake with regard to the identity of the person with whom the defendant was contracting. That was a very similar position to that in the present case, and therefore, in my view, there was here such a mistake as to render this lease void ab initio.

I furthermore hold, although it is not essential to this part of the case, that the mistake was in fact brought about by the fraud of the defendant. It is perfectly true that everyone in this country is permitted for innocent reasons to change his name, but it must depend on the circumstances. I am satisfied here that this was a mere device on the part of the defendant to deceive the landlord with whom she was proposing to enter into a contract, and that she in fact fraudulently misrepresented her identity both before and after the making of the contract.

That is sufficient for the decision on the claim with regard

(1) [1899] 2 Q. B. 647.
(2) 9 Ch. D. 223, 230.
(3) [1927] A. C. 487, 501.

to the lease. The plaintiff is entitled to a declaration that this lease of August 4, 1938, of the premises at 74, Coleman Street, was void ab initio.

[His Lordship then assessed the damages for trespass at 8*l*.]

Judgment for the plaintiff.

Solicitors for plaintiff: *Pinsent & Co.*
Solicitors for defendant: *Bernard Simmonds & Co.*

G. F. L. B.

Criticised by DENNING, L.J. OLIVER *v.* DAVIS. [1949] 2 All E.R. 353.

1939

Nov. 14, 15, 16.

AYRES *v.* MOORE.

Bill of exchange—Action by payee against acceptor—Defence of mistake—What mistake sufficient—Fraud of third party—Effect.

The defendant was the chairman of a company of which F. was the secretary. F. fraudulently represented to the defendant that the plaintiff had advanced money to finance the acquisition of certain patents which the company was formed to acquire, and that the defendant's acceptances of five bills of exchange each for 500*l.*, payable to the plaintiff's order, were required as security for that advance. The defendant, relying on F.'s representations, accepted the bills. F. was in fact personally indebted to the plaintiff for 3780*l.*, no part of that indebtedness being in respect of patents or other business of the company, and wanted the bills because the plaintiff was pressing him to reduce or secure his debt. The defendant dishonoured the bills on presentation, and in an action by the plaintiff as payee, alleged (*a*) that there was no consideration for the bills, or no consideration other than the fictitious advances by the plaintiff for the patents; (*b*) that the defendant accepted the bills under a mistake of fact, namely, that the plaintiff had advanced money for the purchase of the patents, whereas he had made no such advance; (*c*) that the acceptances had been procured by the fraud of F.:—

Held, (*a*) that the prima facie presumption of consideration was not displaced, since there was an antecedent debt owing to the plaintiff, who took the bills from F. in good faith, and without knowledge of F.'s fraud; and

(*b*) that a defendant seeking to repudiate, on the ground of mistake, liability on a bill of exchange accepted by him, was under at least as great an obligation as a plaintiff in an action for money had and received to show that the mistake relied on was a mistake affecting his liability, or as to a fundamental fact, and that the mistake in the present case was not of that character, since, even if F.'s representations had been true, the defendant would not have been personally liable for the plaintiff's advance to the company; but

(*c*) that since the plaintiff was not a holder in due course, he being the original payee of the bills, and the bills being incomplete when he took them, the defendant was entitled to repudiate liability on the ground of fraud, and it was immaterial that the fraud relied on was the fraud of a third party, and not of a party to the bill.

Kelly v. *Solari* (1841) 9 M. & W. 54; *Aiken* v. *Short* (1856) 1 H. & N. 210; *In re The Bodega Co., Ld.* [1904] 1 Ch. 276; *Morgan* v. *Ashcroft* [1938] 1 K. B. 49 applied.

ACTION tried by Hallett J.

The plaintiff, James Arthur Ayres, as the payee and holder of five bills of exchange each for 500*l*., dated March 21, 1938, and payable to the plaintiff's order respectively three, four, five, six and seven months after date, sued the defendant, Major Maurice Storey Moore, as acceptor of the bills, which were dishonoured on presentation. The plaintiff was not a holder in due course of the bills, not only because he was the original payee, but also because the bills were incomplete at the time when he took them, the name of the plaintiff as drawer not having been inserted.

The bills were accepted by the defendant at the request of one Fisher, who represented to him that they were required as security for advances made by the plaintiff to Fisher to finance the purchase of certain patents for the British Kanteck Drill Co., Ld., of which the defendant was chairman and a director, and Fisher was secretary. In fact, Fisher was indebted to the plaintiff to the extent of 3780*l*. in respect of the purchase of certain property and personal loans, but no part of that indebtedness (with the possible exception of 250*l*. as to which no evidence was given) was in respect of patents or any business of the company.

The defendant admitted accepting the bills, but alleged that (*a*) there was no consideration for the bills, or no consideration other than the plaintiff's alleged advances to Fisher in respect of patents; (*b*) the bills were accepted by him under a mistake of fact, namely, that he believed that the plaintiff had advanced to Fisher money to enable Fisher to pay expenses on behalf of the British Kanteck Drill Co., Ld., and that the bills were to discharge that liability, whereas in fact no such advances had been made by the plaintiff; (*c*) the bills were obtained by the fraudulent representations of Fisher as to the plaintiff's alleged advances to him for the business of the company.

Macaskie K.C. and *B. L. A. O'Malley* for defendant (on whom the onus rested). The defendant is not liable on the bills. In the first place, there was no consideration for the bills. The only consideration that can be suggested is the advances which the defendant was informed the plaintiff had made to the company and those advances cannot constitute a good consideration because they did not exist.

Secondly, the defendant accepted the bills under a mistake of fact—namely, that the plaintiff had advanced money to buy patents. It is unnecessary here for the mistake to be, as laid down by Bramwell B. in *Aiken* v. *Short* (1), one which, if true, would make the defendant liable to pay the money. In *Aiken* v. *Short* (1) the mistake was on the part of the plaintiff in an action for money had and received, whereas here the defendant is resisting a claim on bills which he has accepted and different considerations apply. The observations of Bramwell B. cannot be taken as an exhaustive statement of the law: *Morgan* v. *Ashcroft*, per Sir Wilfrid Greene M.R.(2), and the giving of a bill which may obtain a wide circle of negotiability and travel through many hands stands in a very different position from the payment of money under a mistake of fact, which money it is sought to recover in an action for money had and received. There is no authority for the proposition that a bill of exchange given under a mistake of fact as to the purposes for which it is required cannot be avoided unless the mistake, if true, would have made the acceptor liable to pay the money. The real test is whether the acceptor intended to deliver the bill in the circumstances which existed: *R. E. Jones, Ld.* v. *Waring and Gillow, Ld.*, per Lord Sumner (3); *Sinclair* v. *Brougham*, per Lord Dunedin (4); *Morgan* v. *Ashcroft*, per Sir Wilfrid Greene M.R. (5) Here there was no intention by the defendant to deliver the bills to the plaintiff except on the footing that the plaintiff had advanced money for the patents.

Finally, the acceptances were obtained by fraud—the fraud of Fisher—and, as the plaintiff is not a holder of the bills in due course, he cannot enforce payment against any party to the bills, but he must be taken to have received the blank acceptances at his peril: Chalmers' Bills of Exchange, 10th ed., p. 120. A party who takes an incomplete instrument cannot recover on it unless the person from whom he receives it had a real authority to deal with it: *Awde* v. *Dixon*, per Parke B. (1); and here Fisher had no real authority. Even if the plaintiff had been a holder of the bills in due course he could acquire no better title to them than had Fisher from whom he took them, and Fisher clearly obtained the defendant's acceptance to the bills by fraud. By the Bills of Exchange Act, 1882, s. 29, sub-s. 2, the title of a person who negotiates a bill is defective when he has obtained the acceptance thereof by fraud. No right is conferred on the holder of a bill of exchange which has been procured in favour of a third party by false pretences: *R. E. Jones, Ld.* v. *Waring and Gillow, Ld.* (2)

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(1) 1 H. & N. 210, 215.
(2) [1938] 1 K. B. 49, 66.
(3) [1926] A. C. 670, 696.
(4) [1914] A. C. 398, 431.
(5) [1938] 1 K. B. 49, 64, 65.

P. L. E. Rawlins (for *Maurice Lyell* on war service) for the plaintiff. Fisher was the defendant's agent, and they were so closely connected that the defendant cannot take advantage of the mistake of fact arising from Fisher's misrepresentations, if such there were, as to the reason why the bills were needed. In any event, the mistake was not as to a fact which, if true, would have rendered the defendant liable to repay the plaintiff. It might have made it desirable that he should do so, but that is not enough (see per Bramwell B. in *Aiken* v. *Short*. (3)) The defence of mistake is, therefore, not open to the defendant. As to fraud, it is difficult to see on the authorities, how the fraud of a third party can be taken advantage of by one of the two parties to the transaction. In any event the defendant was guilty of negligence in that the proximate cause of his acceptance of the bill of exchange was not the fraud, if proved, of Fisher, but his own neglect to make inquiries as to the accuracy of the information given to him by Fisher.

Macaskie K.C. in reply.

HALLETT J. (after dealing with the issues of fact:) The first ground on which the defendant relies for avoiding his prima facie liability is that there was no consideration entitling the plaintiff to sue on these bills. He has pointed to the fact that the consideration alleged by the plaintiff was that the bills were taken in part satisfaction of the indebtedness of Fisher to the plaintiff and in consideration of the plaintiff forbearing to press Fisher for repayment of his indebtedness during the currency of the bills. "Those terms," the plaintiff alleges, "were agreed orally between Fisher, acting as agent "of the defendant and on his own behalf, and the plaintiff, "at some date in March, 1938, shortly before the delivery of "the bills to the plaintiff by the defendant."

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(1) (1851) 6 Ex. 869, 872.
(2) [1926] A. C. 670, 701.
(3) 1 H. & N. 210, 215.

There is no evidence of any express agreement, oral or otherwise, between Fisher and the plaintiff that, in consideration of being given the bills, the plaintiff would forbear to press Fisher for repayment of his indebtedness to him during the currency of the bills, and the fact that there is no such evidence gives some colour, perhaps, to the first ground on which the defendant relies. In my judgment, nevertheless, there was a good and valid consideration operating in favour of the plaintiff for these bills. I do not think that the consideration which has prima facie to be presumed has been in any way displaced by anything which has been put before me.

Under s. 27 of the Bills of Exchange Act, 1882, "valuable "consideration for a bill may be constituted by (*a*) any con"sideration sufficient to support a simple contract; (*b*) an "antecedent debt or liability." Here there is unquestionably on the accepted facts an antecedent debt or liability. There was an antecedent debt or liability to the plaintiff to the amount of 3780*l.*, and although there may have been no express agreement to forbear, I think that in the present state of the authorities there can be no doubt there was sufficient consideration for the giving of the bills. I think that the bills operated as a conditional payment of part of the past debt, and, therefore, even without an express agreement, that point fails.

The next point on which the defendant relies is this. The defendant says that he gave these acceptances under a mistake of fact. I have already found that he did so, and it has been contended on his behalf that therefore he, having now discovered the mistake, has properly claimed to be released from his liability on the acceptances. In my judgment, that ground also fails.

The claim in all the authorities cited to me with regard to this part of the matter was, I think, one for money had and received, based on an allegation that the money had been paid under a mistake of fact. As regards such a claim it was decided by Bramwell B. in *Aiken* v. *Short* (1) that "In order to entitle a "person to recover back money paid under a mistake of fact, "the mistake must be as to a fact which, if true, would make "the person paying liable to pay the money; not where, if "true, it would merely make it desirable that he should pay "the money." That statement seems to me to be in accord with what had been stated previously by Parke B. in a well known passage in *Kelly* v. *Solari* (2): "I think that where "money is paid to another under the influence of a mistake, "that is, upon the supposition that a specific fact is true, "which would entitle the other to the money, but which "fact is untrue, and the money would not have been paid if it "had been known to the payer that the fact was untrue, an "action will lie to recover it back, and it is against conscience "to retain it." The words there, which are significant, are "which would entitle the other to the money." In *In re The Bodega Co., Ld.* (3), Farwell J. refers to what Bramwell B. had said in *Aiken* v. *Short* (1), and treats it as still good law.

But the matter is really put beyond doubt by a much more recent case of *Morgan* v. *Ashcroft* (4), where the Court of Appeal, considering an appeal from a county court, reviewed these and other cases. I read the judgments of Sir Wilfrid Greene M.R. and Scott L.J. as once more recognizing the soundness of what was laid down in *Aiken* v. *Short* (1), although Scott L.J. does point out that the actual language used in *Aiken* v. *Short* (1) is not perhaps quite wide enough to cover all the cases where a mistake of fact will give rise to a right to recover the money paid as money had and received. Scott L.J.

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(1) 1 H. & N. 210, 215.
(2) (1841) 9 M. & W. 54, 58.
(3) [1904] 1 Ch. 276, 286.
(4) [1938] 1 K. B. 49.

puts it in this way (1): "But I am in complete agreement "with the Master of the Rolls that there is a plain principle "applicable to all those cases of payments in mistake of fact, "and that is that the mistake must be in some aspect or another "fundamental to the transaction. On the facts of this case "there was no fundamental mistake."

I need not refer in detail to those judgments. There they are, to be read and profited from, but Scott L.J. was considering a case where there was a mistake as to the nature of the transaction. In such a case it might be that the language used in the earlier cases would not be entirely applicable and yet the mistake would be of such a character as to entitle the person paying to recover the money back.

Another case to which I have been referred, is *R. E. Jones, Ld.* v. *Waring and Gillow, Ld.* (2), but there again the claim was to recover money paid, as it was said, under a mistake of fact. The cheque by which the payment was made had been honoured, whereas in this case the bills of exchange have been dishonoured, and Lord Sumner points out that there may be a distinction. He says (3): "It is not necessary to "decide whether Waring and Gillow, Ld., could have sued on "the 5000*l*. cheque, as holders in due course, since the cheque "was paid." Then he goes on to discuss the question which he had to decide: whether the money, having been paid without any obligation and under a mistake of fact, could be recovered back.

In the present case, in my judgment, the fact regarding which the defendant was mistaken when giving his acceptances was not a fact affecting his liability within the meaning of the passages I have read from the earlier cases, such as *Aiken* v. *Short* (4), nor a fact fundamental in the sense in which that word is used by Scott L.J. in *Morgan* v. *Ashcroft*. (1) As to liability, I do not think that there can really be any doubt, even assuming that the plaintiff had advanced this money to Fisher to acquire patents or incur expenses in

(1) [1938] 1 K. B. 49, 77.
(2) [1926] A. C. 670.
(3) [1926] A. C. 695.
(4) 1 H. & N. 210.

connection with them for the British Kanteck Drill Company, Ld. (which was the only one of all Fisher's companies with which the defendant was connected), that the defendant was under no sort of liability, legal, or even moral, to provide ways and means of repaying the plaintiff's loan.

The first half of Bramwell B.'s distinction in *Aiken* v. *Short* (1) may require some slight expansion. As regards the second half, it might have been desirable that the defendant should provide for the alleged debt of Fisher to the plaintiff. The reason why the defendant was willing to do this, as I understand it, was that he himself had advanced considerable sums to Fisher to acquire the patents, and unless the acquisition was completed that money might very well be lost. He, therefore, thought that it was in his own interest that he should assist Fisher to stave off the trouble with the plaintiff which might otherwise occur. That falls eminently within the second category of mistake rather than within the first.

I have to remember that this is not an action by a person who has paid money to recover that money as having been paid under a mistake of fact. The person who would be the plaintiff in such an action is here the defendant resisting an action brought on his contract to compel him to pay the money, and, rather curiously, as it seems to me, the researches of counsel have not succeeded in bringing to my notice any case which provides me with an authority on that aspect of the matter as distinct from authorities dealing with claims for money had and received. I recognize that there are obvious distinctions between the two kinds of action, but I think that, in a defence which seeks to repudiate liability on a bill of exchange by reliance on the allegation that the contract was entered into under a mistake of fact, it is at least as necessary as in an action to recover back money paid as money had and received, to show that the mistake was with regard to a fact affecting the payer's liability, or at any rate fundamental in the sense in which Scott L.J. used that term in *Morgan* v. *Ashcroft.* (2) I do not think that a repudiation of liability can be based on an allegation of a mistake of the kind

(1) 1 H. & N. 210.

(2) [1938] 1 K. B. 49.

I have found to have existed in the mind of the defendant in the present case.

The third ground suggested by the defendant as enabling him to escape his prima facie liability is as follows: "My "acceptance," he says, "was obtained by the fraud of Fisher, "and that fact is sufficient to enable me to repudiate the "contract into which I entered by means of that acceptance." It is on that aspect of the matter that the argument has very largely turned.

In my judgment, that contention is correct. There may be circumstances where the fact that a contract on a bill has been procured by fraud does not enure to the disadvantage of the holder of the bill. I need not examine or inquire into every possible set of circumstances. It is sufficient, I think, if I mention two. In the first place, it has been the policy of the Legislature to protect by certain provisions the negotiability of certain classes of instrument, and, for business reasons which are quite obvious, protection has been given to those who have acquired under certain conditions negotiable instruments, although those negotiable instruments may at some earlier stage in the transaction have been tainted with fraud.

Therefore, if a plaintiff is a holder in due course his position may be very different. But Mr. Rawlins conceded that the plaintiff was not a holder in due course of these bills, and in my view that was a very proper concession, for two reasons. The bills when taken by the plaintiff were incomplete inasmuch as there was no name of the drawer inserted therein, and the definition of a holder in due course which is to be found in the Bills of Exchange Act in s. 29, sub-s. 1, is this: "A holder in due course is a holder who has taken "a bill complete and regular on the face of it under the following "conditions . . . ." This bill was taken by the plaintiff when it was not complete. The second reason why I think Mr. Rawlins was correct in making that concession was that, after a great deal of discussion and doubt, it has now been finally decided that the original payee of a bill—in this case the drawer, namely the plaintiff—cannot be a holder in due course. That appears from the decision in *R. E. Jones, Ld.* v.

Waring and Gillow, Ld. (1), to which I have already referred. There was some difference of opinion about it before, but I think that case finally disposes of that point. The plaintiff, therefore, is not protected as a holder in due course.

The holder of a bill may also be protected if there has been something in the conduct of the defendant which in point of law precludes the defendant from relying on the defect which he alleges. In other words, there may be conduct on the part of the defendant which estops him from setting up the defence, at any rate as against the plaintiff, which would otherwise succeed.

In *R. E. Jones, Ld.* v. *Waring and Gillow, Ld.* (1), the majority of their lordships expressed their opinion in favour of the defendants on the ground that the plaintiff was estopped by reason of his conduct from recovering the money. In this case I can see no ground for alleging that the defendant is estopped from setting up the defence based on fraudulent representation which he desires to set up.

It has been sought by counsel for the defendant to suggest that Fisher should be regarded as the agent of the plaintiff. I think that is quite wrong. I do not think that he was the plaintiff's agent in fact or in law. I do not think that if a creditor wants his debtor to pay the money owing to him, and the debtor goes to some third person and makes statements to him with a view to inducing him to provide the required security, it is right either in law or common sense to say that the debtor is the agent of the creditor in making those statements to the third person. I think the circumstances of this case are quite different from those which were shown to exist in *Watson* v. *Russell* (2), where Keys was the agent of the plaintiff to make the payment there in question. On the other side it has been suggested by Mr. Rawlins that Fisher was the agent of the defendant, and of the two propositions I think that one is plainly the more reasonable, because the defendant did give the bills to Fisher to hand over to the plaintiff, but again I do not think that in any real sense the defendant made Fisher his agent.

(1) [1926] A. C. 670. (2) (1862) 3 B. & S. 34; (1864) 5 B. & S. 968.

There are further difficulties in the way of the plaintiff. Assuming that the plaintiff desired to say that the defendant was estopped from relying on this defence by his conduct, it was clearly necessary for the plaintiff to plead that estoppel with particularity and I cannot here find any pleading which can be regarded as covering satisfactorily or at all an allegation of estoppel. Secondly, assuming that an estoppel had been pleaded, it would then have been necessary for evidence to be given in support of that plea, but no such evidence has been forthcoming. Accordingly, the defendant is not precluded from relying on the defence of fraud.

There remains only one point for consideration. Again, it is a point not entirely free from difficulty. It is strenuously contended that the fact that the acceptance was procured by the fraud of a third party is not sufficient to entitle the defendant to repudiate his obligation as against the plaintiff. Mr. Rawlins' proposition, if I correctly understood it, is that it must be shown that the plaintiff was actually or notionally guilty of complicity in the fraud before that fraud can operate against him. If that were the position—if it were necessary for an immediate party to be personally tainted by the fraud that he might be deprived of his rights under the bill—then a great many of the provisions which the Legislature has thought fit to enact, and a great deal of discussion and argument in the cases, would be superfluous. In my view, it is precisely because a holder of a bill may be affected, although he is personally innocent of fraud, that there are those provisions for protecting a holder in due course. I do not think that an immediate party as such is likewise protected, and in my judgment, although no very clear authority has been cited to me, he is not.

I, therefore, come to the conclusion that of the three grounds of defence raised on behalf of the defendant two fail but one succeeds. I think that the defence of no consideration fails. I think that the defence that this obligation can be repudiated because it was entered into under a mistake of fact also fails so far as it is a separate ground from the ground based on fraud, but I think that, the acceptance having been obtained by fraudulent representation and the obligation having been repudiated as soon as might be after the fraud was discovered, the defendant is entitled to my judgment in this action, which I give him accordingly, with costs.

Judgment for defendant.

Solicitors for defendant: *Gibson & Weldon.*

Solicitors for plaintiff: *Wilberforce Allen & Bryant, agents for F. S. Collinge & Co., Colchester.*

J. W. H.

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Local government—Public health—Structure detrimental to the amenities of the neighbourhood—Order requiring owner to execute works of repair—Works not specified in order—Validity of order—Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 58.

By an order of justices under s. 58 of the Public Health Act, 1936, the owner of a certain structure which, by reason of its ruinous and dilapidated condition, was seriously detrimental to the amenities of the neighbourhood, was ordered "to execute "such works of repair or restoration, or, if he so elects, to take "such steps by demolishing the building or structure . . . . and "removing any rubbish resulting from the demolition, as may "be necessary for remedying the cause of complaint." No works were specified in the order, and the owner appealed against the order to quarter sessions. His appeal was dismissed, and he then obtained a rule nisi for certiorari, on the ground that the order was bad in that it did not specify the work of restoration or repair to be executed. The Divisional Court discharged the rule holding that an order under s. 58 need not specify the works required to be executed:—

Held, by the Court of Appeal, that the decision of the Divisional Court was correct for the reasons there stated.

Decision of Divisional Court [1939] 2 K. B. 98 affirmed.

APPEAL from a decision of the Divisional Court upon a rule nisi for certiorari. (1)

The applicant for the rule, Millar Johnstone McVittie, was the owner of a site in Tonge Moor Road, Bolton, on which a cinematograph theatre was erected. In 1930 the cinematograph theatre was almost completely destroyed by fire, and there remained upon the site nothing but some unsightly steel stanchions, and other debris. As soon as the Public Health Act, 1936, came into force on October 1, 1936, the Town Clerk of Bolton wrote calling the applicant's attention to s. 58, but as no steps were taken by him, the local authority applied to a court of summary jurisdiction, which made an order "that the said Millar Johnstone McVittie, the owner of "the said structure, is required under the said s. 58 of the

(1) [1939] 2 K. B. 98.

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"said Act to execute such works of repair or restoration or, if "he so elects, to take such steps by demolishing the building or "structure . . . . and removing any rubbish resulting from "the demolition as may be necessary for remedying the cause "of complaint within six calendar months from this date."

No works were specified in the order, and the applicant appealed against it to quarter sessions. The appeal was dismissed, and the applicant obtained a rule nisi for a writ of certiorari to bring up and quash the order of quarter sessions on the ground " that the said order was defective and bad in "law in that it purported to confirm an order made the 16th "day of December, 1937, by the court of summary jurisdiction "for the County Borough of Bolton, which last mentioned order "did not specify the works of restoration or repair to be "executed and/or things to be done for the remedy of the "cause of complaint."

The Divisional Court, on March 30, 1939, held that an order under s. 58, sub-s. 1, of the Public Health Act, 1936 (1), need not specify the works to be done, and discharged the rule nisi for certiorari.

The applicant appealed. The appeal was heard on November 10, 1939.

R. M. Montgomery K.C. and *J. W. Stansfield* for the appellant. The decision of the Divisional Court was wrong. The order made by the court of summary jurisdiction against the appellant was made under s. 58, sub-s. 1, of the Public Health Act, which is in Part II. of the Act, which is headed " Sanitation and Buildings." That section deals with dangerous

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(1) The Public Health Act, 1936, s. 58, sub-s. 1: " If it "appears to a local authority that "any building or structure, or "part of a building or structure— ". . . . (*b*) is by reason of its "ruinous or dilapidated condition "seriously detrimental to the "amenities of the neighbourhood, "the authority may apply to a "court of summary jurisdiction, "and the court may . . . . " (ii.) . . . . make an order requir-"ing the owner of the building or "structure to execute such works "of repair or restoration or, if he "so elects, to take such steps by "demolishing the building or "structure or any part thereof and "removing any rubbish resulting "from the demolition, as may be "necessary for remedying the "cause of complaint."

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or dilapidated buildings and structures, and under it a local authority may obtain from a court of summary jurisdiction an order requiring the owner of the ruinous or dilapidated building to execute such works of repair or restoration or, if he so elects, to take such steps by demolishing the building or structure or any part thereof and removing any rubbish resulting from the demolition, as may be necessary for remedying the cause of complaint. Similar words occur in ss. 93 and 94 of the Act with reference to the abatement of a nuisance, and it has been held in cases decided under s. 75 of the Public Health Act, 1875, which is reproduced in ss. 93 and 94 of the Act of 1936, that it is for the Courts to determine what works are necessary in order to remedy the nuisance. In the schedule to the Act of 1875 a form of order was set out which is omitted in the Act of 1936. Two of the cases were decided on that form of order, and therefore those cases are not applicable to the construction of the 1936 Act.

[GODDARD L.J. The Act of 1936 gives the owner of the ruinous or dilapidated property an option whether he will demolish the property which is an eyesore or whether he will repair it.]

The Court must tell the owner what works are necessary in order to repair the eyesore, otherwise he may do certain work which he considers will be sufficient and then the local authority may step in and ask that other works shall be done and/or they may execute the works themselves under sub-s. 2 of s. 58.

[CLAUSON L.J. If the local authority acts wrongfully the owner may obtain an injunction.]

The local authority would have a discretion to decide whether the order has been complied with unless the necessary works are specified. Restoration of a dilapidated building does not necessarily involve a reconstruction of the building in the same form. An owner of a building ought not to be left in uncertainty as to what he has to do in order to comply with the order. Joyce J. said in *Attorney-General* v. *Staffordshire County Council* (1): " In my opinion it is the necessary

(1) [1905] 1 Ch. 336, 342.

"requisite of every injunction and every mandatory order "that it should be certain and definite in its terms, and it "must or ought to be quite clear what the person against "whom the injunction or order is made is required to do or "to refrain from doing." The order in the present case is like a mandatory order.

W. Gorman K.C. and *W. G. Morris* for the respondents were not called upon to argue.

Scott L.J. In this case, the owner of a piece of land in Bolton, on which, in the year 1930, a cinematograph theatre was burned to the ground, although a number of the steel pillars of the building were left untouched by the fire, was ordered, in the year 1937, to restore or repair the building or remove the ruinous structure and make the site presentable so that it should no longer impair the amenities of the town of Bolton. From that order made by the magistrates, and confirmed by the deputy-recorder, there was an appeal to the Divisional Court by certiorari asking that the order should be quashed. The Divisional Court, in March, 1939, discharged the rule nisi that had been granted, and upheld the validity of the order made. The owner appeals to this Court, submitting that the Divisional Court ought not to have discharged the rule, but ought to have made it absolute. The proceedings were taken under s. 58 of the Public Health Act, 1936, which, in sub-s. 1, provides as follows: "If it appears to a local "authority that any building or structure, or part of a "building or structure (*a*) is in such a condition . . . . as "to be dangerous," or (*b*)—and this is the material provision— "is by reason of its ruinous or dilapidated condition seriously "detrimental to the amenities of the neighbourhood, the "authority may apply to a court of summary jurisdiction, "and the court may," in the first-mentioned case, deal with the danger, and "in the second-mentioned case, make an "order requiring the owner of the building or structure to "execute such works of repair or restoration or, if he so "elects, to take such steps by demolishing the building or "structure, or any part thereof and removing any rubbish

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"resulting from the demolition, as may be necessary for "remedying the cause of complaint." Then sub-s. 2 provides: "If the person on whom an order is made under sub-s. 1 of "this section for the execution of works, or the demolition "of a building or structure or of any part of a building or "structure, and the removal of any rubbish resulting from "the demolition, fails to comply with the order within the "time therein specified, the local authority may execute the "order in such manner as they think fit and may recover "the expenses reasonably incurred by them in so doing from "the person in default, and without prejudice to the right "of the authority to exercise those powers, he shall be liable "to a fine."

The order made by the magistrates in this case was made in the precise words of the section following a complaint lodged on behalf of the local authority also in the precise words of the section. The complaint was made by the Town Clerk, " for that it appears to the Council of the said County "Borough being the local authority within the meaning of "the Public Health Act 1936 that a certain structure situate "in Tonge Moor Road in the said County Borough formerly "known as ' Tonge Picturedrome ' is by reason of its ruinous "condition seriously detrimental to the amenities of the "neighbourhood And the said local authority by the said "complainant on their behalf intends to apply to the Court "of Summary Jurisdiction mentioned below for an order "in accordance with the provisions of section 58 of the "Public Health Act 1936 requiring you the owner of "the said structure," and then follow the words of the section.

The order of the court of summary jurisdiction, which was satisfied that the words of the complaint were well-founded, was precisely in those words, ordering " the owner of the "said structure to execute such works of repair or restoration "or, if he so elects, to take such steps by demolishing the "structure or any part thereof and removing any rubbish "resulting from the demolition as may be necessary for "remedying the cause of complaint."

Now, the ground upon which the rule nisi for certiorari was moved on behalf of the owner was that, under the section, an order in that form was not authorized. It was urged that the section ought to be interpreted as requiring the authority to specify the precise works of this restoration or repair which the local authority required, and that, as the order did not say that, it was necessarily bad and not one that was authorized by the section.

The Divisional Court, consisting of the Lord Chief Justice, Macnaghten and Singleton JJ., on the showing of cause, discharged the rule nisi, and with that decision and with everything that was said in the three judgments I entirely agree and think the appeal therefore should be dismissed.

I add very little. The appellant has put before us photographs of the site in Bolton showing what it looks like from various points of view from the public street. They were exhibited in the original Court and in each subsequent Court, and it is obvious from those photographs that, ever since the theatre was burned down in the year 1930, it has been a dreadful eyesore in the street of Bolton where it is. Fortunately, since the Act of 1936 was passed, proceedings on the ground of injury to the amenity of a neighbourhood are now possible. It is said, as I have already mentioned, that there ought to be details of what the owner is expected to do mentioned in the complaint and the order, and the chief reason put forward for that interpretation of the section is that similar words appear in certain sections relating to nuisance in a different part of the Public Health Act of 1936, and that there have been decisions on the wording of those sections about nuisance under previous Acts which have been re-enacted in the Act of 1936, in which no option was given to the owner at all; he merely had to abate the nuisance, and it was held that there was an obligation on the prosecuting authority to give some information as to what the works should be.

In my view the Divisional Court was absolutely right in refusing to have the interpretation of this very valuable new section cut down by decisions on a wholly different type of section. By reason of the difference in purpose the other

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section is not in pari materia with the section which has to be construed. I can see no difficulty in the construction put upon this section by the Divisional Court, because if the unsightly cause is a comparatively small thing, which may nevertheless be very unsightly, the words "restore or repair" give an ample indication to the owner of what he has to do; and, anyhow, he knows what his building was, and if he wants to re-erect it after it has been practically destroyed he can do so under the form of order made. But, on the other hand, if he recognizes that it is not good business to re-erect that old building, that does not entitle him to keep the site disfiguring the neighbourhood at the expense of the inhabitants of the town, in order that he may wait for some bid from somebody who may, perhaps, use some of the old steel uprights. The practical effect of the provision is, of course, that when a complaint is made on the lines of the section, the owner of disfiguring property, knowing that pressure can be put upon him if he does not act, always has the opportunity of going to the local authority and saying: "Now I have got plans out to deal with this site, will you "give me a little more time to put up a building." These Public Health Acts must be worked with a reasonable spirit appreciating their true object, and arrangements can be made in most cases so that they do not press unduly upon the person who is subjected or may be subjected to such an order.

I adopt the judgment of the learned Lord Chief Justice as my own, and add nothing more. The appeal will be dismissed with costs.

Clauson L.J. I agree.

Goddard L.J. I agree, and I am content to adopt the judgment of Macnaghten J. as my own. But in deference to Mr. Montgomery's argument I will add a word or two. I do not think that this section has any true analogy to the nuisance section. The nuisance section does not give the householder on whose premises the nuisance is, an option; it requires him to abate a nuisance. There is no doubt a line of authority which shows, when there is a nuisance, that the householder is entitled, in general, to be told what the local authority require to be done in order to abate the nuisance. Now, if s. 58, which we are considering, was a section which applied to any sort of building which offended against the amenities of a district, in other words, if it was a case dealing merely with the æsthetics of a building, I think very likely the owner might be entitled to say: "My ideas "of art are different from yours; if you object to this building "of mine as offending against the amenities of the district, "tell me in what way you think they do offend, otherwise I "shall not know whether to repair it in neo-Gothic or bastard-"Tudor style." But that is not what the section says; the section deals only with a building which offends against the amenities of the neighbourhood because of its ruinous or dilapidated condition. Then the section says the justices may order a man to repair, to restore or to pull down, and he can choose for himself what he will do, and if it is a ruinous or dilapidated building he can repair it if he likes. Whether there is any real difference between "repair" and "restore" I do not stay to inquire; for myself I doubt whether there is. He can repair it or restore it or pull it down—he can please himself. I do not think there is any warrant at all for saying that the justices must dictate to the owner and specify exactly what repairs are to be done; they have simply to say: "You have a ruinous or dilapidated building; repair it or "pull it down, whichever you please." Whether or not there be any merits in this appeal, from what I see in these photographs it is impossible to suppose for a moment that there are any merits in allowing a lot of twisted iron stanchions to remain standing by a residential road in Bolton on what is now a weed-overgrown site. Mr. McVittie must have known perfectly well that all he was required to do was to clear away the rubbish, and thus comply with the section. If he had cleared away the rubbish there would have been no trouble, but he chose to keep this deplorable sight in

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existence ever since 1930, and now has fought this case up to the Court of Appeal. The only satisfactory feature, to my mind, is that he will have the pleasure and privilege of paying the costs.

Appeal dismissed.

Solicitors for appellant: *Peacock & Goddard, for Percy H. Barker & Co., Manchester.*

Solicitors for respondents: *Simmons & Simmons, for P. S. Rennison, Town Clerk, Bolton.*

R. F. S.

ROUSOU *v.* PHOTI; GORT ESTATES COMPANY, THIRD PARTY.

1939
Dec. 8, 15.

Housing—Landlord and tenant—Repair, maintenance and sanitary condition of houses—Small houses—Obligations of landlord—Conditions to be implied on letting—" Rent not exceeding 40*l.*"—*Net rent—Deduction of rates from inclusive rent—Housing Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 2., *sub-s.* 1.

The third party let to the defendant for human habitation a house situate in the administrative county of London at a weekly rent of 17*s.* 6*d.*, this sum including rates which were paid by the third party. A rent of 17*s.* 6*d.* a week is equivalent to a yearly rent of 45*l.* 10*s.*, but it was admitted by the third party that, if the amount of the rates attributable to the house was deducted from the sum payable by the defendant to the third party, the balance remaining would not exceed 40*l.* a year:—

Held, that " rent " in s. 2, sub-s. 1, of the Housing Act, 1936, meant the net rent or annual value of a house, ascertained by deducting the amount of the rates from an inclusive rent, which a tenant pays for the right to occupy the demised premises without adventitious advantages, so that, the net rent of the house not exceeding 40*l.* a year, the house fell within the sub-section and there must be implied in the contract for its letting a condition that it was, at the commencement of the tenancy, and an undertaking that it would be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation.

The words " rent not exceeding . . . . 40*l.*" in the sub-section mean a yearly rent of that amount.

ISSUE tried by Atkinson J.

In July, 1937, the third party let to the defendant the second floor of a house, 27, Stephen Street, London, W., at a rent of 17*s.* 6*d.* a week, this sum including rates which were paid by the third party. In September, 1937, the defendant let one of the rooms on the said second floor to the plaintiff who, some days later, it was alleged, was injured by part of the ceiling of the room falling on him.

The plaintiff having begun an action against the defendant in which he claimed damages, alleging that the defendant had been negligent in not discovering and remedying the unsafe condition of the ceiling, the defendant obtained leave to serve notice on the third party claiming to be indemnified by the third party against the plaintiff's claim on the ground

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that the letting by the third party to the defendant of the second floor of the house was the letting for human habitation of a house in the administrative county of London at a rent not exceeding 40*l.*, and, therefore, by s. 2, sub-s. 1, of the Housing Act, 1936 (1), there must be implied in the contract for that letting a condition that the house was, at the commencement of the tenancy, and an undertaking that it would be kept by the third party during the tenancy, in all respects reasonably fit for human habitation, and that, if, as the plaintiff alleged, part of the ceiling had fallen and injured him, that fall was due to a breach of the said condition of the tenancy.

Subsequently, this issue was directed to be tried to determine whether or not the house consisting of the said second floor was a house let at a rent not exceeding 40*l.* within s. 2, sub-s. 1, of the Housing Act, 1936.

It was admitted by the third party that, if the amount of the rates attributable to the second floor was deducted from the sum payable by the defendant to the third party, the balance remaining would not exceed 40*l.* a year. It was also agreed that the words in s. 2, sub-s. 1, of the Housing Act, 1936, "at a rent not exceeding . . . . 40*l.*" meant "at a "rent not exceeding 40*l.* a year."

Skelhorn for defendant. This house falls within s. 2, sub-s. 1, of the Housing Act, 1936. Admitting for the moment that a weekly rent of 17*s.* 6*d.* is equivalent to a rent of 45*l.* 10*s.* a year, that sum in this case includes rates and, to ascertain the rent for the purposes of the sub-section, the amount paid by the defendant in respect of rates, which is admittedly more than 5*l*. 10*s*. a year, must be deducted from the total payment: *Sheffield Waterworks Co.* v. *Bennett* (1); *Wilkinson* v. *Bury Water Board.* (2) "Rent" in the sub-section means the proper or net rent—namely, that which is paid by the tenant for the use of the demised premises and not in respect of any other matter: *Smith* v. *Birmingham Corporation*, per Denman J. (3) If that were not so some of a number of houses, all of the same size and value, might fall within the sub-section, and some outside it, merely according to whether the houses were let at an inclusive or at a net rent. Furthermore, the majority of small houses are let on weekly tenancies, but, if "rent" in the sub-section means the actual sum payable by a tenant, all weekly lettings would be outside the section, for a letting at x shillings a week is not necessarily a letting at 52 x shillings a year. Under the Rent Restriction Acts it has been held that "rent" must be taken to include rates where they are payable by the tenant: *Mackworth* v. *Hellard* (4); but that decision was due to there being in s. 12, sub-s. 1 (*c*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, a definition of "net rent" as the "standard rent less rates" and "standard "rent" or "rent," when appearing in the Act, had to be contrasted with that definition. See also *Westminster and General Properties and Investment Co.* v. *Simmons.* (5) But, in any case, the result of multiplying 17*s*. 6*d*. by fifty-two is not to be taken as the yearly rent of this house. An allowance must be made for "voids," i.e., the chance of the house being empty from time to time which is inseparable from weekly lettings: *Smith* v. *Birmingham Corporation.* (6)

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(1) By s. 2, sub-s. 1, of the Housing Act, 1936: "In any "contract for letting for human "habitation a house at a rent not "exceeding—(*a*) in the case of a "house situate in the adminis- "trative county of London, 40*l.* ". . . . there shall, notwith- "standing any stipulation to the "contrary, be implied a condition "that the house is at the com- "mencement of the tenancy, and "an undertaking that the house "will be kept by the landlord "during the tenancy, in all "respects reasonably fit for human "habitation."

By sub-s. 3: "In this section ". . . . the expression 'house' "includes part of a house."

G. F. Kingham for third party. "Rent" in ordinary parlance means the money which is paid by a tenant to his landlord for the right to occupy the demised premises, and in the absence of reason to the contrary "rent" in s. 2, sub-s. 1, of the Housing Act, 1936, must be given its natural and ordinary meaning. Moreover, importance must be attached to the word "contract" in the sub-section. Its effect is that the contract between the landlord and the tenant must be looked at to see what the rent is and the contract in the present case states that the defendant is to pay to the third party "17*s*. 6*d*. rent." The defendant seeks to read the word "net" into the sub-section before "rent," but that cannot be done unless it is necessary: *Bristol Waterworks Co.* v. *Uren.* (1) *Sheffield Waterworks Co.* v. *Bennett* (2) is distinguishable, the subject-matter there under discussion being very different from that of the present case. In any event, the decision there that "rent" must be taken to mean "annual value" is to be regarded as one confined to that particular case: per Lord Sterndale M.R. in *Mackworth* v. *Hellard.* (3) On a distraint for rent the third party could have recovered at the full rate of 17*s*. 6*d*. a week. For the purposes of the section the proper method of arriving at the yearly equivalent of a weekly rent is to multiply that weekly rent by fifty-two.

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(1) (1872) L. R. 7 Ex. 409; affd. (1873) L. R. 8 Ex. 196.

(2) (1905) 92 L. T. 417.

(3) (1883) 11 Q. B. D. 195, 200.

(4) [1921] 2 K. B. 755.

(5) (1919) 35 Times L. R. 669.

(6) 11 Q. B. D. 195.

Skelhorn replied.

Cur. adv. vult.

1939. Dec. 15. ATKINSON J. delivered a judgment in which he stated the facts, read s. 2, sub-ss. 1 and 3, of the Housing Act, 1936, and continued: The main question is: What is the meaning of the word "rent" in sub-s. 1? It is said by the third party that it means the amount actually paid by the tenant to the landlord notwithstanding that the landlord has to pay away part of that sum in rates, etc., and, further, that if you multiply 17*s*. 6*d*. by fifty-two, the amount comes to over 40*l*. in a year, and, therefore, the house is outside the sub-section. For the tenant it is said that the sub-section refers to the true or net rent, a sum arrived at after deducting at least the rates and taxes payable, and, further, that a weekly letting at 17*s*. 6*d*. is not the same as a yearly letting at 45*l*. 10*s*., as the latter sum makes no allowance for what is called "voids."

The first point which is noticeable about the section is that it does not indicate any period in respect of which the rent of 40*l.* is to be payable, but I think it must be taken—and I understand that both counsel take the same view—that the Legislature had in mind a yearly letting at 40*l.* If by " rent " is meant the actual sum agreed to be paid by a tenant, as the third party contends, it would seem that weekly tenancies are not provided for. I have great difficulty in seeing how a contract to take a house on a weekly tenancy is the same thing as a contract to take a house at a yearly rental, and yet it is impossible to suppose that the Legislature meant to exclude houses let on weekly terms. The declared aim of the statute was to protect small houses. The heading immediately above s. 2 reads as follows: "Provisions for securing the repair, maintenance and sanitary "condition of houses. Obligation of lessors of small houses." The marginal note is: " Conditions to be implied on the "letting of small houses." On the other hand, if by " rent " is meant the sum which represents the true annual value or net rent, this difficulty is avoided. The sub-section would read in this way: " In any contract for letting a house at a sum "which indicates a true annual value or rent not exceeding "40*l.* . . . ."

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(1) (1885) 15 Q. B. D. 637.
(2) L. R. 7 Ex. 409.
(3) [1921] 2 K. B. 755, 759.

Again, the declared aim being to protect small houses, it is reasonable to suppose that the Legislature meant to provide a uniform standard whereby to decide whether a house was a small house or not. One man has two houses exactly alike. He lets one at 30*l.* a year, the tenant paying rates and taxes amounting to, say, 12*l.* Admittedly, this house is within the sub-section. The other house is let at 42*l.*, the landlord paying the rates and taxes of 12*l.* Can it reasonably be said that this house is not equally as small a house as the other ? Can it really be thought that the Legislature meant to protect the one and not the other ? Can an astute landlord take a house out of the Act by saying : " I will pay the rates " and adding the amount of them to the rent ? Again, there is no means of comparison of the value of different houses if adventitious advantages can be taken into consideration in fixing rents. It seems to me that one is driven to the

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conclusion that the Legislature had in mind the sum which the tenant pays for the right to occupy the premises in a normal state and without adventitious advantages, or, putting it the other way round, the sum which the landlord puts into his pocket in a year for rent after paying rates and taxes.

There are several cases which throw light on the problem, and indicate that that is the true view. The first to which I was referred was *Sheffield Waterworks Co.* v. *Bennett.* (1) By a local Act the plaintiffs were bound to supply the houses within a certain district with water " at the following rate per "annum, that is to say, where the rent of such dwelling-"house " should not amount to *7l.* per annum, at a rate not exceeding 6 per cent. per annum on such rent. The defendant was owner of numerous small houses supplied with water by the plaintiffs, in respect of which he paid, either under statutory obligation or by voluntary agreement, the poor-rate, water-rate, and district-rate. It was held that " rent " in the local Act was equivalent to annual value, and that in estimating the rents on which the water-rate was payable, the defendant was entitled to deduct the rates so paid by him. Bramwell B. pointed out one of the difficulties to which I have alluded when he said (2): " On the other hand, the "defendant insisted that it was impossible that the word "' rent ' could have the meaning contended for by the "plaintiffs ; and he called attention to the fact that the Act "always speaks of the rent ' per annum ' of the premises, so "that where there was no letting at a yearly rent, but from "month to month or week to week, the case was on that "construction not provided for." Later he said (3): " But "the defendant, as I said before, contends that this really "— that is the amount included for rates—" is no part of the "rent ; it is not part of the annual value of the premises . . . . "It would be unreasonable to say that these things contributed "to the rent of the houses, although as between landlord and "tenant they might conveniently use the term ' rent,' and

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(1) (1872) L. R. 7 Ex. 409 ; affd. (1873) L. R. 8 Ex. 196.

(2) Ibid. 416.

(3) Ibid. 418.

"agree that it should be distrained for, and in point of law "it might all issue out of the realty. It is impossible to suppose "that, for the purposes of the Act of Parliament, and to enable "the company to charge rates upon the sum so payable, it "would be rent." Both the judgments delivered in that case contain much helpful matter. I do not want to read more than is necessary, but there is another paragraph of the judgment of Bramwell B., in which he says (1): "The word "'rent' cannot signify strictly the rent actually or accidentally "paid. In a row of houses all of equal value, one might be let "at a nominal rent from love or affection; another might be "let at a greatly reduced rent to a servant in the employ of "the landlord; another might yield a small rent because the "tenant had repaired the house himself or paid a premium; "and no one would contend that in any such cases the actual "rent would be the criterion. It would not be the criterion "in any case in which it does not form a means of comparison "with other houses as regards their worth. In general, "the rent paid is what the house is worth, and is the real "criterion of value as distinguished from a mere estimate. "It makes the test a fact which is certain, and excludes "partiality." He proceeded to hold that the word "rent" in the section under consideration meant the proper rent paid by a tenant who also paid the rates and charges regularly defrayed by a tenant. That is the same thing as the yearly worth or annual value.

The next case was *Smith* v. *Birmingham Corporation* (2) which turns on the construction of an expression which is, I think, exactly equivalent to the one which it is agreed must be read into the Housing Act. It was provided by a Water Act that the charge to be made for the supply of water for domestic use should be at a rate varying according to the "annual rent" of the premises supplied. The appellant was the owner of certain houses supplied with water by the respondents under the Act. The houses were let at weekly rents, the appellant paying all rates charged thereon, and also for all repairs and insurances in respect thereof. The

(1) L. R. 7 Ex. 420. (2) 11 Q. B. D. 195.

respondents charged the appellant with water-rates calculated on the following basis. They multiplied the weekly rents by fifty-two and deducted from the amount so arrived at the actual sums paid by the appellant for rates, and then charged the water-rates upon the balance. It was held that, in order to arrive at the "annual rent" on which the water-rate was to be computed, an allowance should be made in respect of "voids," i.e., houses lying vacant from time to time, and that the actual amount of the poor-rates and other rates paid by the appellant was rightly deducted. There is clear authority for the proposition that in order to arrive at the "annual "rent" of houses let on weekly tenancies the amount paid by the landlord for rates and taxes must be deducted, and also a proper sum on account of voids, that is, the chances of houses let on weekly terms being empty from time to time.

The same view was taken in *Wilkinson* v. *Bury Water Board* (1) where the phrase to be considered was "annual rack "rent or value." Finally, the point I have to decide was considered by Lewis J. in *Jones and Jones* v. *Nelson* (2), a case under s. 2, sub-s. 1, of the Housing Act, 1936. The actual decision in that case turned on the fact that no notice of the want of repair had been given to the landlord and, therefore, that he was not liable to the claim which was being made against him, but the point which I have to determine was fully argued, and the learned judge expressed a clear view as to what the expression "rent" meant. Although it is not an actual decision, it is a very valuable guide to the conclusion at which I ought to arrive. He says: "The "question which is put to me, and which I have to decide, "is whether or not in this section of the Act 'rent' means "12*s*. 6*d*. or 12*s*. 6*d*. less the rates. There is authority for "saying that 'rent payable' means what it says—namely, "the amount which is given to the landlord—but that is not "what the section says. The section says 'rent,' and I am "inclined to the view that Mr. Gorman's point as to this "is right, and that the word 'rent' as used in this section is "equivalent to annual value, or the amount which actually

(1) 92 L. T. 417.

(2) [1938] 2 All E. R. 171, 173.

"comes into the landlord's pocket. I incline to this view "upon a consideration of the decision of the Court in "*Sheffield Waterworks Co.* v. *Bennett* (1), where it was held "that 'rent' means the amount which comes into the "landlord's pocket, and not the gross rent the tenant has "to pay. The considerations in that case apply here, and I "should be prepared to hold that, in the circumstances, the "house was a house within the Housing Act, 1936, s. 2." Lewis J. apparently had not the advantage of having *Smith* v. *Birmingham Corporation* (2) cited to him, but obviously he had been referred to the last case which I will mention: *Mackworth* v. *Hellard*. (3) There the question was what "rent payable" meant in s. 12, sub-s. 7, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. That section, it will be remembered, provides that "where the rent "payable in respect of any tenancy of any dwelling-house is "less than two-thirds of the rateable value thereof, this Act "shall not apply to that rent or tenancy . . . ." It was there held by the Court of Appeal that "rent payable" meant the rent which the tenant had to pay, and not the net amount which the landlord got after paying the rates and taxes. That decision seems to me to be of no help in the case I have to decide. I respectfully agree with what Lewis J. said about it. The decision turned on the word "payable." What was the rent payable? The Court felt that it could not get away from that and distinguished the cases to which I have referred on that ground. The word "payable" does not appear in the section which I am considering and it cannot be read into it.

I have come to the conclusion that the only reasonable interpretation of the sub-section is that contended for by the defendant, and that his rooms constitute a house which was within the sub-section.

It is unnecessary to decide the further point whether, in seeking to ascertain the true annual rent, one has merely to multiply the weekly rent by fifty-two, or whether one must make

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(1) L. R. 7 Ex. 409.
(2) 11 Q. B. D. 195.
(3) [1921] 2 K. B. 755.

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a deduction from the sum so arrived at on the ground that a yearly letting avoids the risk of " voids " which is inseparable from a letting on weekly terms. *Smith* v. *Birmingham Corporation* (1) seems to me to be a clear authority for the proposition that some such deduction would have to be made, but I need not deal further with that as I have come to a clear view on the other point.

Judgment for defendant.

Solicitor for defendant : *Leonard Kasler.*
Solicitors for third party : *Walfords.*

(1) 11 Q. B. D. 195.

G. F. L. B.

WILKINSON *v.* CHETHAM-STRODE.

1939
Oct. 30;
Nov. 1;
Dec. 11.

Highway—Pedestrian crossing places—Precedence of foot passenger over vehicular traffic—Duty of driver approaching crossing—Transit across road divided by refuge—Single crossing—Contributory negligence—Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935 (*dated January* 25, 1935), *reg.* 5.

The plaintiff left the western pavement of a road and started to go over a controlled pedestrian crossing when the traffic lights were in his favour and against the defendant's car, but, before he reached a refuge which was on the crossing in the middle of the road, the lights changed and the defendant received a signal that she might proceed over the crossing between the refuge and the eastern pavement of the road. The plaintiff paused at the refuge and then stepped into the roadway in front of the defendant's car which knocked him down. In an action for damages for personal injuries the plaintiff alleged that the defendant had been guilty of negligence and breach of the statutory duty imposed on her by reg. 5 of the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, in that she had not allowed him free and uninterrupted passage over the crossing, he having started to go over the crossing, which must be regarded as one single crossing from pavement to pavement, although divided by the refuge, before she had received a signal that she might proceed over the crossing. The defendant denied negligence and contended that there were two crossings, one from the western pavement to the refuge and the other from the refuge to the eastern pavement, and that she was not in breach of her statutory duty because the plaintiff had not started to go over the crossing where the accident took place before she received a signal to proceed. It was found as a fact that neither the plaintiff nor the defendant used reasonable care having regard to the peculiarities and dangers of the crossing :—

Held, that the whole transit from pavement to pavement was a single crossing, and not two crossings, but that the plaintiff ceased to be on the crossing when he reached the refuge, which was a separate entity from the crossing, and stepped into a space enclosed by its contours, so that, when he stepped from the refuge into the roadway without using due care, he was both capable and guilty of contributory negligence and the defendant was entitled to succeed.

Chisholm v. *London Passenger Transport Board* [1939] 1 K. B. 426 applied.

ACTION tried by Asquith J. without a jury.

On July 10, 1938, the plaintiff was crossing, from west to east, Artillery Row, Westminster, S.W., on a pedestrian crossing close to the junction of Artillery Row and Victoria Street, when he was knocked down by the defendant's motor-car and injured. The learned judge held that the crossing was a crossing at a road intersection where traffic was controlled by lights within reg. 5 of the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935. (1)

In the middle of Artillery Row at that point was a refuge consisting of three sections of paved surface raised above the level of the carriageway, the middle section carrying an electric lamp standard and the other two sections each carrying a pylon. Between each section was a gap of unpaved roadway, about four feet wide, so that a pedestrian could cross Artillery Row by either of those gaps without mounting the paved parts of the refuge, but continuing throughout on the level of the carriageway. A pedestrian so crossing would have on his left a line of metal studs extending from the western pavement to the northern end of the refuge and continuing thence to the eastern pavement, and on his right a metal "stop" line extending from the western pavement to the southern end of the refuge and a line of studs thence to the eastern pavement.

The road junction was controlled by four traffic lights working automatically in conjunction—two showing east and west along Victoria Street, and two showing north and south along Artillery Row and Buckingham Gate, which led into Victoria Street from the north almost opposite Artillery Row—so that the lights facing north and south were red when those facing east and west were green, and vice versa.

The judge found that the plaintiff left the western side of

(1) By the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935 (dated January 25, 1935) :—

"Reg. 3. The driver of every "vehicle approaching a crossing "shall, unless he can see that there "is no foot passenger thereon, "proceed at such a speed as to be "able if necessary to stop before "reaching such crossing."

"Reg. 5. The driver of every "vehicle at or approaching a "crossing at a road intersection "where traffic is for the time being "controlled by a police constable "or by light signals shall allow "free and uninterrupted passage "to every passenger who has "started to go over the crossing "before the driver receives a signal "that he may proceed over the "crossing."

Artillery Row when the traffic lights were green in his favour. He reached the refuge, paused in the southern space between raised sections of the refuge, and then stepped forward towards the eastern pavement of Artillery Row. The defendant, who had driven her car southwards down Buckingham Gate, had been halted at the junction of Buckingham Gate and Victoria Street by a red light against her. That light turned green in her favour (and consequently red against the plaintiff) when the plaintiff was between the western pavement of Artillery Row and the refuge. The defendant moved forward across Victoria Street, entered Artillery Row, and her car struck the plaintiff when he was some steps from the refuge towards the eastern pavement of Artillery Row.

The plaintiff brought the present action claiming damages for the injuries received by him which he alleged were due to the defendant's negligence and/or breach of the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935. (1) The defendant denied negligence or breach of duty and, alternatively, pleaded contributory negligence.

Cyril Salmon for plaintiff.

Armstrong-Jones for defendant. The defendant is not liable. She was not under any obligation under the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, reg. 5, to allow the plaintiff free and uninterrupted passage because, when she received a signal that she might proceed over the crossing where the accident occurred, he had not then started to go over it. On this ground *Bailey* v. *Geddes* (2) can be distinguished and the defendant can succeed if she can establish contributory negligence on the part of the defendant. It is true that the plaintiff had left the western side of Artillery Row before the defendant received a signal to proceed, but the true view is that there were two pedestrian crossings at the material place, one from the western pavement of Artillery Row to the refuge and the other from the refuge to the eastern pavement, and, while the plaintiff had started to go over the former crossing before the defendant received a signal to proceed, he had not started to go over the latter crossing before that time, and it is the latter crossing which alone is to be considered in this case. A road divided by a refuge was treated as bearing two distinct crossings in *Chisholm* v. *London Passenger Transport Board.* (1) The refuge in the present case was no more a part of the carriageway than was the pavement in *Chisholm* v. *London Passenger Transport Board.* (1) The plaintiff stepped off the refuge in front of approaching traffic when it was unsafe to do so. He was guilty of contributory negligence and his claim must fail: *Chisholm* v. *London Passenger Transport Board* (1); *Knight* v. *Sampson.* (2)

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(1) See note (1), ante p. 310. (2) [1938] 1 K. B. 156.

Cyril Salmon in reply. The plaintiff is entitled to succeed. Artillery Row, at its junction with Victoria Street, must be regarded as bearing one crossing divided by the refuge and not two separate crossings. The plaintiff had started to go over the crossing before the defendant received a signal to proceed and therefore she was obliged to give him free and uninterrupted passage over the crossing: Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, reg. 5. The part of a road which is provided for pedestrians to cross would in ordinary parlance be said to be one crossing although there was a refuge in the middle of it. The crossing was so treated in *Chisholm* v. *London Passenger Transport Board* (1) and a crossing is clearly contemplated as going from one side of the road to the other in the Traffic Signs (Pedestrian Crossings) Provisional Regulations, 1934, reg. 2 and Schedule (where the phrase "crossing," not "crossings," "in conjunction with "refuge" is used), and in the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, reg. 7. Moreover, in s. 108 of the Metropolis Management Act, 1855, power is given to local authorities to place posts or other erections "in any carriageway" so as to "make the crossings thereof less "dangerous for foot passengers." The erection of the sections of paved surface to form a refuge in the present case cannot prevent the surface between them being part of the carriageway.

(1) [1939] 1 K. B. 426.
(2) (1938) 159 L. T. 257; 54 Times L. R. 974.

There was, therefore, one crossing here; the plaintiff had started on it before the defendant received a signal to proceed; the case is indistinguishable from *Bailey* v. *Geddes* (1); and contributory negligence by the plaintiff is not open to the defendant as a defence.

Cur. adv. vult.

1939. Dec. 11. ASQUITH J. read a judgment in which, having stated the facts as summarized above and discussed the evidence, he said: The result of these findings is that neither party was using reasonable care, having regard to the peculiarities and dangers of this particular crossing, which reasonably vigilant persons would have appreciated and made provision for, and that the plaintiff's injuries were caused by the combined negligence of both parties. I also find that the negligent conduct of the defendant and the plaintiff was substantially simultaneous, and leaves no room for the operation of the rule of "last opportunity." Hence, if the liability of the parties fell to be determined exclusively by the common law—that is, if there were no question here of a pedestrian crossing and the peculiar statutory incidents attached to such crossings—the action must fail. The plaintiff can only succeed if the operation of the regulations referred to relieves him of liability for contributory negligence.

The further question, accordingly, arises whether the crossing at the mouth of Artillery Row, or any part of it, is a pedestrian crossing governed by the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935. I will call these, for short, the 1935 regulations. The material 1935 regulations are Nos. 2, 3, 4, and 5. No. 2 defines a crossing as "a crossing place for foot passengers indicated by a traffic "sign prescribed for the purpose by Regulations made by the "Minister." Then No. 3 is: "The driver of every vehicle "approaching a crossing shall, unless he can see that there is no "foot passenger thereon, proceed at such a speed as to be able "if necessary to stop before reaching such crossing." No. 4

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(1) [1938] 1 K. B. 156.

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is: "The driver of every vehicle at or approaching a crossing "where traffic is not for the time being controlled by a police "constable or by light signals shall allow free and uninterrupted passage to any foot passenger who is on the carriage-"way at such crossing, and every such foot passenger shall "have precedence over all vehicular traffic at such crossing." Finally, reg. 5 is: "The driver of every vehicle at or approach-"ing a crossing at a road intersection where traffic is for the "time being controlled by a police constable or by light signals "shall allow free and uninterrupted passage to every foot "passenger who has started to go over the crossing before the "driver receives the signal that he may proceed over the "crossing."

First, therefore, is this crossing a crossing place for foot passengers indicated by a traffic sign prescribed for the purpose of regulations made by the Minister? The material regulations dealing with traffic signs are the Traffic Signs (Pedestrian Crossings) (No. 2) Provisional Regulations, 1934, dated November 7 of that year. I will call them, for short, the 1934 regulations. I need not recite these regulations beyond stating that the relevant ones are Nos. 2 (*a*), 3, sub-cl. (1.) and sub-cl. (2.), and 4.

It was at first argued for the defendant that the mouth of Artillery Row was not a pedestrian crossing within the meaning of the 1935 regulations, and that those regulations did not apply to it because it was not indicated by the traffic signs prescribed by the 1934 regulations. It was argued that, although indicated by studs, as provided in the 1934 regulations, the studs were not in all cases separated by the intervals specified in reg. 3 (2.) of those regulations. Some colour was lent to this suggestion by the plan, which, if accurate, showed the studs to be wrongly spaced. The point is, at the best, a very technical one, but counsel and I both viewed the crossing and found that the plan was in this respect misleading and that the studs in fact complied with the regulation. The point that this was not a pedestrian crossing was, therefore, rightly abandoned by defendant's counsel.

If, then, the 1935 regulations apply, which of them applies directly to this case? Regulation 4 applies only to crossings where traffic is not controlled by a police constable or by light signals. Regulation 5 applies only to crossings which are so controlled. I come to the conclusion, having regard to the arrangement of light signals described above, that this is a "controlled" crossing, and that as between regs. 4 and 5 reg. 5 is the relevant regulation. Regulation 3 would appear to apply both to controlled and to uncontrolled crossings, but reg. 5 seems more directly in point in this case.

Assuming that my findings of fact are right, and assuming that the regulation which applies directly is reg. 5, if the whole transit from pavement to pavement, including the refuge and its gaps, is a single pedestrian crossing, then the plaintiff must, in the absence of other considerations, succeed, for on my findings he had "started to go over the crossing" before the defendant "received a signal that she might "proceed over the crossing," and she failed to give him "free "and uninterrupted passage." This duty would appear, on the authorities, to be an absolute duty, not excused by any contributory negligence on the part of a pedestrian.

At first sight, this might seem to conclude the case in favour of the plaintiff. If a crossing is a pedestrian crossing, and a pedestrian is fairly and squarely on the crossing when he is run down, then by the Court of Appeal decision in *Bailey* v. *Geddes* (1), the plaintiff would seem to be incapable of contributory negligence. It is true that in *Bailey* v. *Geddes* (1) the crossing was an uncontrolled crossing governed by regs. 3 and 4, and not, as here, a controlled crossing governed by regs. 3 and 5, but there seems to be no ground for distinguishing between the application of regs. 4 and 5 quoad the immunity of the plaintiff from liability for contributory negligence.

To distinguish the case from *Bailey* v. *Geddes* (1), defendant's counsel argued (*a*) that the transit from side to side of Artillery Row consisted, not of a single pedestrian crossing, but of two crossings, one from the western pavement of Artillery Row to the island and a second from the island to the eastern pavement of Artillery Row; and (*b*) that if so, then, in stepping from the island on to the second crossing, the plaintiff was not a person "on a crossing" within reg. 3, nor a person who had "started to go over the crossing" within reg. 5, but was a person stepping on to a crossing in the same sense and to the same extent as the plaintiff in *Chisholm* v. *London Passenger Transport Board.* (1) In that case the Court of Appeal held that, while a person fairly and squarely on a pedestrian crossing was incapable of contributory negligence, a person stepping on to such a crossing suddenly from the footwalk under the wheels of approaching traffic was both capable and guilty of contributory negligence. In support of the argument that the so-called pedestrian crossing was in reality two distinct crossings, it was argued for the defendant that the western half of the crossing was controlled and the eastern half uncontrolled, as was held in *Chisholm* v. *London Passenger Transport Board* (1) of the north and south halves of the crossing at the mouth of Fleet Street. As to this contention, I do not think that the two halves of this crossing were as to one controlled and as to the other uncontrolled. The foundation of the Court's decision in *Chisholm* v. *London Passenger Transport Board* (1) that the Fleet Street crossing was of this character was that no light from Fleet Street showed east towards Ludgate Circus. The light on the northern pavement of Fleet Street was blind to westbound traffic moving into Fleet Street. To such traffic no lights from Fleet Street were visible at all. In this case the corresponding light is that on the western pavement of Artillery Row, and this was not a blind light, but showed to north as well as to south. The only object of its showing northwards, that is, towards Buckingham Gate, must have been to control the movements of vehicles such as the defendant's car coming across Victoria Street into Artillery Row. This being so, I think that both halves of the mouth of Artillery Row were controlled, but even if it were otherwise, nothing in the language of the Court of Appeal in *Chisholm* v. *London Passenger Transport Board* (1) supports the suggestion that because half of a road is controlled and half uncontrolled there are two separate crossings. Passage after passage might, indeed, be cited from the judgment of Scott L.J. to negative that suggestion. I, therefore, hold that the whole transit across the mouth of Artillery Row was a single pedestrian crossing.

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(1) [1938] 1 K. B. 156.

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(1) [1939] 1 K. B. 426.

This, however, again does not dispose of the matter. It is manifest that, if a pedestrian on a refuge at a pedestrian crossing were free to step under the wheels of traffic approaching it at a reasonable pace and then to hold such traffic liable without being open to the answer of contributory negligence, much the same inconveniences and absurdities would result as were stressed by the Court of Appeal in *Chisholm* v. *London Passenger Transport Board.* (1) To say this is not to overlook the fact that, while a person standing on the edge of a footwalk may or may not intend to cross the road, no sane person standing on a refuge has any other intention than to complete a transit to one pavement or the other, a fact of which drivers of vehicles must be taken to be aware. It is merely to recognize that traffic would be gravely impeded if every driver of a vehicle approaching a crossing, who had to pass within a yard or two of a refuge with a pedestrian on it, had to slow down to a snail's pace, lest the pedestrian elect without warning to step off the refuge when the vehicle was within a foot or two of him. Unless the language of the material regulation is so plain that this result is inevitable, Courts will lean in favour of a construction which avoids it. When reg. 5 says that in certain circumstances a pedestrian who has started to go over a crossing is to have " free and uninterrupted passage," it seems to me reasonable to construe its language as subject to the implied limitation that this right is only to be enjoyed by the pedestrian so long as he is on the crossing itself, and I think he ceases to be on the crossing when he reaches a refuge and steps on to it, or, as in this case, into a space enclosed by its contours and within its protection.

Counsel were unable to cite to me any case which directly decides whether a refuge in the middle of a crossing is part of the crossing or not. I have been informed that there is

(1) [1939] 1 K. B. 426.

an unreported case in which a person was convicted of lingering on a pedestrian crossing when he was in fact pausing on a refuge, but the conviction was quashed on appeal on the ground that for the purpose then in hand the refuge was not part of the crossing. There is also a diagram annexed to the Traffic Signs (Pedestrian Crossings) Provisional Regulations of June 7, 1934, in which are used the words: "Crossing in "conjunction with refuge," and "Crossing where no refuge," which, so far as they go—and at best they carry one a very short way—may be taken to imply a distinction between the crossing itself and a refuge as something superimposed on it. I hold that the refuge is for the present purpose a separate entity from the crossing, there being nothing in principle and no authority which binds me to hold otherwise, and what authority there can be said to be pointing to that conclusion.

If this be so, one who steps off a refuge is stepping from something which is not part of the crossing on to something which is, and by analogy with *Chisholm* v. *London Passenger Transport Board* (1) he is capable of contributory negligence if he steps on to it abruptly and when traffic travelling at a reasonable speed cannot stop in time to avoid hitting him. This is what I find the plaintiff did in the present case. He is guilty at common law of contributory negligence and must fail unless he can pray in aid the immunities conferred by regs. 5 or 3. For the reasons I have given, I do not think he can invoke them successfully. There must, therefore, be judgment for the defendant with costs.

Judgment for defendant.

Solicitors for plaintiff: *Pothecary & Barratt.*
Solicitors for defendant: *Stanley & Co.*

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(1) [1939] 1 K. B. 426.

G. F. L. B.

KENT AND ANOTHER *v.* EAST SUFFOLK RIVERS CATCHMENT BOARD.

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Oct. 17, 18;
Nov. 3.

[1937. K. No. 80.]

Water—Land drainage—Breach in bank of tidal river—Damage to adjoining pasture land by flooding—Catchment board empowered but not obliged to repair breach—Repair undertaken by board—Unnecessary delay in performance of work—Corresponding increase of damage to land—Liability of board to landowner—Misfeasance or non-feasance—Land Drainage Act, 1930 (20 & 21 *Geo.* 5, *c.* 44), *ss.* 34, 81.

Owing to an unusually high tide the water of a tidal river caused a breach in the protecting river bank and overflowed and injured adjoining pasture land belonging to the plaintiffs. The river was comprised in the area of the defendants, a catchment board constituted under the Land Drainage Act, 1930, who in the exercise of their statutory powers undertook the work of repairing the breach in the wall. The method of work which the defendants first adopted was unsuccessful, but an alternative method which they afterwards adopted enabled them to close the breach after they had been at work for one hundred and seventy-eight days in all. An action having been brought by the plaintiffs against the defendants for damages for the flooding of their land by the alleged negligence of the defendants, it was found as a fact that the alternative method was the only effective method of doing the work, that if the defendants had adopted that method from the first, as they could have done, the breach in the wall would have been closed in fourteen days instead of one hundred and seventy-eight days, and that by reason of the delay great additional injury had been occasioned to the plaintiffs:—

Held, by the Court of Appeal (Slesser and MacKinnon L.JJ., du Parcq L.J. dissenting), that though the defendants were under no duty to exercise the powers conferred upon them by the Act of repairing the wall, yet, having chosen to exercise these powers, they were under a duty to exercise them with such care, skill and expedition, that no one would be injured thereby, that there had been a failure on their part to perform that duty, and that they were therefore liable for the damage thereby occasioned to the plaintiffs.

Judgment of Hilbery J. affirmed.

APPEAL from the judgment of Hilbery J. in an action tried by him without a jury.

The facts were shortly as follows (1):—

The plaintiff, Henry Kent, was the occupier, and the plaintiff, Richard George Porter, was the freeholder, of a dairy farm and premises known as Hemley Hall, in the county of Suffolk. About fifty acres of marsh land which formed the greater part of the pasturage of the farm lay adjacent to the tidal part of the river Deben. Between that marsh land and the river there had existed for a number of years a wall which was a necessary protection to keep the incoming tides when they rose above a certain height from coming upon the land.

The defendants, the East Suffolk Rivers Catchment Board, were a catchment board authority constituted under the Land Drainage Act, 1930, with all the powers vested in such boards by the Act, and the river Deben was in their area.

On December 1, 1936, owing to the coincidence of a spring tide and a northerly gale, the water of the river rose to an unusually high level, with the result that it made a breach in the protecting wall of some twenty-five feet in length and inundated the plaintiffs' adjoining pasture land.

The plaintiffs immediately brought the occurrence to the notice of the defendants, and on December 2, 1936, Mr. T. C. Clark, a surveyor of the defendants, along with his assistant, Mr. Abbott, and a Mr. Studd, who had previously been in the employ of the defendants, and they, on behalf of the defendants, decided to undertake the work of closing the breach in the wall in order to prevent the tides from further flooding the said land.

The method they first adopted was that of driving a dam straight across the breach. This method was tried three times, namely, in December, 1936, and January and February, 1937, but without success. It was interfered with to some extent because of the existence in the sill of the breach of a large hole which had been caused by the action of the tidal water and became larger in the course of the operations, and also because the men employed on the work were too few in number and wanting in skill and the materials inadequate.

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(1) Further particulars of fact are given below in the judgments of the Lords Justices.

One result of this method was that a large quantity of the material used in stopping the breach, consisting of bags of clay and piles, was washed out of it and scattered over two and a half acres of the plaintiffs' land.

Mr. Clark and his assistants then adopted an alternative method, namely, that of making on the saltings between the wall and the river a semi-circular dam passing from the wall on one side of the breach to the wall on the other side of it, so as to exclude the tides from the breach, and to enable the hole in the sill to be filled up and a continuous foundation to be provided for the new wall; and they at the same time employed a larger number of men and men more skilled in the work.

On May 28, 1937, as a result of using that alternative method, the defendants' employees at length succeeded in closing the breach in the wall, after having been continuously engaged upon the work in one way or another for one hundred and seventy-eight days.

About the same time the plaintiffs brought this action against the defendants alleging in their statement of claim that on the river wall breaking down and the plaintiffs' land becoming flooded, the defendants as was their duty began to repair the wall, but in breach of their duty to do the same efficiently and with the utmost expedition possible, the defendants took no steps so to repair the wall, and failed and neglected to see that sufficient labour was employed or continuously employed or that proper or any supervision was given thereto or that proper or any adequate methods were adopted to mend the breach in the wall and clear the said land of water within a reasonable time, or at all, in consequence whereof such flooding had continued for many months, and that by reason thereof the land had been and would be rendered valueless to the plaintiff Porter, and the plaintiff Kent's cows and milk were depreciated in value; and the plaintiffs claimed a declaration that the defendants were liable to compensate the plaintiffs for their loss and injury, an inquiry as to the amount of such loss and injury, and payment of the amount so ascertained.

The defendants in their defence said (inter alia) that they

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denied that they at any time owed any duty to the plaintiff to keep the wall of the river in repair; that they denied that they were negligent in any of the ways alleged; and that if they were under any duty to repair or keep in repair the said wall, and if, which was denied, they acted in breach of such duty whereby the plaintiffs had suffered damage, the plaintiffs had no cause of action at law for damages in respect of such matters.

When the case came on for trial, Hilbery J. on consideration, allowed an amendment of the statement of claim by the addition thereto of an allegation that the defendants negligently adopted at the outset a method or system of work for closing the breach which was unskilful and negligent inasmuch as in the circumstances it could not have succeeded within a reasonable time, whereas there was available an alternative method which could have succeeded in reasonable time and would have prevented most, if not all, of the damage which had occurred to the plaintiffs.

The learned judge having heard the evidence on both sides, came expressly or in effect to the following findings of fact: That the direct method of stopping the breach in the wall by a dam thrown across the breach was not a reasonably skilful method, and that the alternative method of a dam on the saltings was the only effective method; that the defendants could have employed all along a larger number of men and more skilled men and more adequate materials; that if the alternative method had been adopted from the first with a sufficiency of skilled men and materials the breach in the wall might have been closed in fourteen days instead of the one hundred and seventy-eight days actually taken; that on each of the days on which the work lasted beyond fourteen days the defendants had in effect inflicted upon the plaintiffs fresh damage and injury by flooding; and that the direct method had caused the plaintiffs further injury by increasing the size of the hole in the sill which would have to be filled in at their expense, and by causing the said refuse to be scattered over their land.

On March 22, 1939, Hilbery J. gave judgment, in which he said that the decided cases supported the view that the plaintiffs had a cause of action against the defendants on the ground that what the defendants did was done without reasonable skill or care to safeguard the plaintiffs. If the defendants had merely done nothing they could not have been compelled to repair the wall, but as they had embarked upon and carried on the work, then in law a duty arose on their part to exercise reasonable care in the way in which they did the work so as not to injure the plaintiffs, and on the facts and evidence it was established that they had failed in the performance of that duty. This was not a mere case of non-feasance by the defendants, or failure to exercise their powers. It was a case of the negligent exercise of their powers, and one of the results of the negligence was undue delay before the breach in the wall was closed. There would be judgment for the plaintiffs, not for a declaration, but for such sum as would be found due to them as representing the damage suffered in consequence of the acts of misfeasance of the defendants.

The defendants appealed. The appeal was heard on October 17, 18, 1939.

Gilbert Beyfus K.C. and *F. W. Beney* for the defendants, appellants. The learned judge was wrong in holding that the defendants were liable under the Land Drainage Act, 1930, s. 34 (1) or otherwise, for the damage to the plaintiffs by the flooding of their land owing to the breach in the river wall. There was no absolute duty upon the defendants to repair the wall, although they had power to do so. If the defendants had done nothing and allowed the water to flow through the breach in the wall on to the plaintiffs' land they would not have been liable for the non-feasance. But the judge held that because the defendants commenced to repair the breach by a wrong method and did not employ a sufficient number of

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(1) The Land Drainage Act, 1930, provides: s. 34. "(1.) Every "drainage board acting within its "district shall have power—(*a*) to "maintain existing works, that is "to say, to cleanse, repair or "otherwise maintain in a due "state of efficiency any existing "watercourse or drainage work."

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skilled men and sufficient material, and consequently took a longer time to do the work, they were liable for misfeasance. It is submitted that if a person is not liable at all to remedy an accident which took place owing to an act of God, he is equally not liable if he attempts to remedy it and takes a long time in doing so. The defendants cannot be liable for delay in doing that which they were not bound in law to do. Their delay is just as much non-feasance as if they had not done anything. Delay in exercising a power without a duty to exercise it does not impose any liability. Scrutton L.J. pointed out in *Sheppard* v. *Glossop Corporation* (1) that "it is "not negligent to abstain from doing a thing unless there is "some duty to do it." Any damage which the plaintiffs have suffered is due to the forces of nature creating the breach in the wall and the defendants are not liable for failing to remedy it. If the defendants have been negligent they are at most liable for the sacks of clay and poles used by them in attempting to stop the breach having been spread by the tide over part of the plaintiffs' land. *Symes and Jaywick Associated Properties* v. *Essex Rivers Catchment Board* (2); *Smith* v. *Cawdle Fen, Ely* (*Cambridge*) *Commissioners* (3); and *Gillett* v. *Kent Rivers Catchment Board* (4) were also cited.

Russell Vick K.C. and *R. Fortune* for the plaintiffs, respondents. The decision of the learned judge was correct. Under the Land Drainage Act, 1930, although the defendants may only be empowered and not bound to maintain and repair any watercourse or drainage work, yet, if they undertake to maintain or repair such a work, they must do so in a proper and reasonable manner. The principle is that if a person who is empowered to act, though under no duty to do so, assumes to act, he comes under a duty to act properly and reasonably, and if by failing to observe that duty he does injury to another person, he is liable to that person in damages. In *Geddes* v. *Bann Reservoir Proprietors* (5) Lord Blackburn said (6): "An action does lie for doing that

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(1) [1921] 3 K. B. 132, 145.

(2) [1937] 1 K. B. 548.

(3) (1938) 82 Sol. Jour. 890; [1938] 4 All E. R. 64.

(4) [1938] 4 All E. R. 810.

(5) (1878) 3 App. Cas. 430.

(6) Ibid. 456.

"which the legislature has authorised, if it be done negli-"gently." In *Sheppard* v. *Glossop Corporation* (1) Atkin L.J. said (2): "If a local authority having statutory powers "decides to exercise those powers, it is under a duty to persons "interested to take reasonable care not to cause damage, so "far as the avoidance of damage is consistent with the "exercise of the statutory powers." The present case falls within these judicial pronouncements. Here the defendants having, in the exercise of their statutory powers, undertaken the work of repairing this river wall, came under a duty to do the work in a reasonable and proper manner, but they have wholly failed to perform that duty. They began their operations by adopting an improper method of doing the repairs, and they failed to employ a sufficient number of skilled men and sufficient materials. The result was that they did not succeed in closing the breach in the wall so soon as it might have been closed. They lowered the gap in the breach and allowed more water to overflow the plaintiffs' land, and caused greater damage to the plaintiffs than they would otherwise have sustained. They were guilty not of mere non-feasance, but of misfeasance, and are liable to the plaintiffs for the consequence of their negligence: *Penny* v. *Wimbledon Corporation* (3) and *McClelland* v. *Manchester Corporation.* (4) By undertaking to do the work and doing it incompetently the defendants deprived the plaintiffs of the opportunity of remedying the breach themselves. If a person undertakes to do work for another he must do it reasonably, and if he does it negligently, he may be liable in damages: *Wilkinson* v. *Coverdale.* (5)

Gilbert Beyfus K.C. replied.

1939. Nov. 3. The following judgments were read :—

SLESSER L.J. In this case the learned judge has held, for the reasons contained in his judgment, that the defendants

(1) [1921] 3 K. B. 132.
(2) Ibid. 150.
(3) [1899] 2 Q. B. 72.
(4) [1912] 1 K. B. 118.
(5) (1793) 1 Esp. 75.

have caused damage to the plaintiffs by the negligent exercise of their powers to repair a sea wall, powers which are conferred upon them by s. 34 of the Land Drainage Act, 1930. As a result of such negligence, the failure properly to repair the wall, a breach which happened on December 1, 1936, was not filled so as to keep out the sea until May 28, 1937, a period of one hundred and seventy-eight days. It is not disputed that the prolonged incursion of sea water very seriously affected the land as marsh pasturage. The learned judge is of opinion that by the exercise of reasonable skill the work could have been done and the flooding arrested in fourteen days from the failure of the sea wall. For the consequent injury to the marsh lands by inundation for one hundred and sixty-four days of salt water ruinous to their use as marsh land pasture he has awarded damages to the owner and occupier tenant of the farm.

On behalf of the appellants reliance is placed upon s. 34 of the 1930 Act, which says that the defendants, among other authorities, have power to repair or otherwise maintain the sea walls, but have no duty so to do. It is argued that to make abortive and incompetent efforts before achieving the final successful result was no more than to delay the exercise of their power—a mere non-feasance for which in law they are not liable. It is now beyond argument that a body having powers but no duties conferred by statute can be under no liability if damage arises to a person by the mere failure to exercise that power. (*Sheppard* v. *Glossop Corporation* (1) and the cases there cited; *Smith* v. *Cawdle Fen, Ely* (*Cambridge*) *Commissioners.* (2)) It is elementary that actionable negligence cannot arise unless there is a duty; in the circumstances of this case did the defendants by their conduct impose upon themselves such a duty?

There is no doubt that on December 2 the clerk to the defendants told the plaintiff Porter, in answer to a complaint by him of the incursion of the sea water and of a breach in the wall twenty-five feet wide, that the board's attention had been directed to the matter. On December 19, in answer to a letter from a Mr. Smith of Blaxhall, who had previously looked after the wall, and sought re-employment thereon, the defendants say it was decided that the work should be carried out by the board's own workmen. Complaints by Mr. Porter were repeated on December 18, 1936, and January 5, 1937. By January 30 the defendants, through their officer, admit that their work had been ineffective and that the tide had twice washed away the piling since January 11. Again on March 3 Mr. Porter complained and on April 8 Mr. Kent, the tenant, said the breach was thirty yards wide. At all these times, indeed until May 28, I am satisfied that the defendants undertook and attempted to do the work under their powers, and were continuously upon the plaintiffs' land for that purpose, a right being expressly given them by s. 34 of the 1930 Act to enter on the land for the purpose of maintaining existing works.

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(1) [1921] 3 K. B. 132.

(2) [1938] 4 All E. R. 64.

In my opinion this case on examination resolves itself into a complaint, not of failure to exercise powers, but of damage done by their incompetent exercise. So far as regards minor damage, the strewing of bags and debris and piles upon the plaintiffs' land, the making of holes by scouring, and the use of the plaintiffs' existing wall to form material for the final successful curved wall made over the saltings, it is not disputed, apart from questions of absence of pleading, that the defendants might be liable as for a misfeasance. But, it is argued, this does not apply to the far greater damage done by the defendants to the plaintiffs by their persistent user over a long period of an incompetent method and consequent failure to fill the breach. This, it is said by the appellants, is but damage solely caused by delay in the exercise of powers, and, if so, not actionable.

This argument appears to me to be over subtle. There was no delay in the initiation of the exercise of the powers, they were exercised early in December when the defendants, in accordance with their statutory powers, entered upon the plaintiffs' land and started the abortive work.

As to the damage, had the powers not been so negligently exercised, it is reasonable to suppose that the plaintiffs would not impotently have stood by, seeing the damage develop unchecked, but themselves would have called in Mr. Smith or some other expert, and he would almost certainly have filled the gap by a competent method in some fourteen days.

The crucial question, therefore, on all the facts arises, is it right to conclude that this damage was the result of the defendants delaying the exercise of their powers, or was it an exercising of their powers in a negligent manner so as to be actionable ? In my opinion, it was the latter, and the damage was thus due to their negligence in that after December 19 at the latest the plaintiffs were induced to their detriment to rely upon the board's undertaking to do the work and themselves to abstain from doing it. Had the board done nothing, the plaintiffs could not have complained, but once the board undertook to do and did attempt to do the work, and in the exercise of their powers entered upon the plaintiffs' land, drove piles into it and bungled the work, that negligence was a continuing negligent exercise of their powers and not solely an abstention from the exercise of them.

For these reasons, in my opinion, this appeal should fail.

MacKinnon L.J. The plaintiff Porter is the owner in fee of a farm to the south of the river Deben in Suffolk. The plaintiff Kent is the tenant occupier of the farm. The Deben, below Woodbridge, is a tidal estuary. Some fifty acres of the farm in question are marshland pasture. This marshland is lower than the bed of the river--the result in part of alluvial deposit in the river, and in part of the secular drying up of the marsh. The marsh has for centuries been protected from the incursion of water from the river at high tide by a wall of earth. Until recently no one was concerned to keep this wall in repair except the man who owned it, whose interest it was to maintain it in order to preserve his marshland from being flooded.

In 1926 Mr. Porter employed one Smith of Blaxhall to put the wall in order and to repair a sluice. He paid them 546*l.* for work upon his wall and 125*l.* for the sluice. Smith, who gave evidence in the case, said that for many generations his family had been in business as marshmen and repairers of river walls.

The Land Drainage Act, 1930, created various public bodies called drainage boards and catchment boards. One of the catchment boards is that for the East Suffolk Rivers, which include the Deben, and is the defendant board. By s. 6 the powers of drainage boards shall so far as concerns the main river, and the banks thereof, be exercisable solely by the catchment board. And by s. 34 a drainage board is given power to maintain existing works, that is to say, to cleanse, repair, or otherwise maintain in a due state of efficiency any existing watercourse or drainage work. A proviso enacts that nothing in this section authorizes any person to enter on the land of any person except for the purpose of maintaining existing works.

There can be no question that this Act empowered the defendant board for the future to relieve Mr. Porter of the task of keeping the river wall in repair and in an efficient state to keep the marsh pasture from being flooded at high tide. A layman might well imagine that when a public body had been set up with this power, and furnished with public funds (to be provided by the county council), it would be their duty to exercise that power, and that Mr. Porter, or any other owner of part of the river walls, would have ground of complaint if they failed in such duty. But the layman would need to be instructed that it is well settled that a public authority that is empowered to do a thing, but not ordered to do it, may with impunity abstain from doing anything. In the catchwords of the doctrine it is not liable for non-feasance.

On December 1, 1936, there was a very high tide in the Deben, and Mr. Porter's river wall gave way. A breach of some twenty-five feet was created, and the water, which is almost undiluted sea water, flooded the marshes. If this sea water continued for a length of time to rush in at every high tide the grass would be killed and the pasture ruined. It was imperative that the breach should be repaired as soon as possible, so that as soon as possible the water should drain off by the sluice and the pasture be more or less dried.

On the next day, December 2, Mr. Porter reported this disaster. By a venial error he wrote to the clerk of the River Deben (Lower) Drainage Board. He ended his letter: "I "must request your Board to take immediate steps to repair "the damage." The error in the address was immaterial, for the clerk of the drainage board was also clerk of the catchment board. In the latter capacity that gentleman replied on December 3: "The wall in question is a main wall and "comes under the jurisdiction of the Catchment Board and I "believe already has the attention of the Board's surveyor."

This answer to Mr. Porter's request seems to me a clear intimation that the board were undertaking the task of repairing the wall, and an implied intimation that under sub-s. 4 of s. 34 of the Act of 1930 they were proposing to enter upon the land of Mr. Porter for the purpose of maintaining the existing work, i.e. the wall.

The surveyor to the catchment board was Mr. Clark. Apparently on December 3 Mr. Smith, of Blaxhall, the man who had looked after the wall before, having seen this breach, wrote to the board in the hope of being employed to repair it. On December 14 he had a reply from Mr. Clark: "Dear Sir, "In reply to your letter of 3rd instant I placed this matter "before my Board on Tuesday last when it was decided that "the works should be carried out by the Board's own workmen "and not by contract. With many thanks for your kind "offer, Yours faithfully, G. C. Clark, Surveyor."

One might suppose from the terms of this letter that the board had some sort of organization for dealing with matters of this sort, and had its "own workmen." In truth, as appeared from the evidence, they had neither the one nor the other. The man Studd, whom Mr. Clark entrusted with the task of filling this breach, had been for eighteen months in the employment of the board, but he had had absolutely no experience of this sort of work of stopping a breach. He had to get casual labourers, with no experience at all, from the local unemployment exchange, and he began work with two of them. He had one wheelbarrow, and later got another or two more. He was given piles that were too short, and nothing to drive them with but a beetle. When he asked for a pile-driver Mr. Clark said it was too expensive. These are all items from the evidence of Studd on behalf of the plaintiffs.

I do not propose to go in detail into the evidence. I think it is clear that the work of Studd and the casual labourers was entirely incompetent. It is not surprising that on December 21 Mr. Porter sent to the surveyor a bitter letter of complaint, dated December 18, from Mr. Kent, the farmer: "You must know what a serious matter it is for both you and "me, as the water has been on so long that the grass will be "killed, therefore the marshes will be useless .... Just "fancy they only have about four men, and they want quite "fifty, and those are off the dole, none of them seem to know "how to start the job, and no sooner they put something in "the next tide washes it away." No reply being sent to this, Mr. Porter wrote again on January 5. Six days later Mr. Clark wrote to say that "your previous letter of 21st "December appears to have been mislaid by me." He adds: "Unfortunately owing to trouble with the men working on "the job I have had great difficulty," and ends by hoping that "this work will be completed to everyone's satisfaction at an "early date." This is written on January 11, when the tide had been flooding the marshland ever since December 1. On January 30 Mr. Clark writes to say that since his letter of the 11th the tide had twice washed away the ineffective piling. On March 3 Mr. Porter writes to the clerk to say that things are as bad as ever, and ends his letter by suggesting that Mr. Smith of Blaxhall, who repaired the wall for him in 1926, "might be able to assist your surveyor in this matter." Mr. Porter presumably did not know that Smith had offered his services on December 3, and that on December 14 the surveyor had replied that the board had decided that the work should be carried out "by its own workmen."

On April 8, solicitors for Mr. Kent write to say that the breach is thirty yards wide, and "each tide floods the marshes "with further salt water." The clerk in reply says the breach is sixty-five feet, *not* thirty yards, a correction which, so far as concerns the opening for water, seems immaterial. On April 29, Mr. Kent writes to say that things are as bad as ever—"in fact "this week there has been more water than ever on the "marshes." And he adds the comment: "Fancy men work-"ing from eight in the morning till four in the afternoon on "such an important job, either when the tide is in or out, and "nothing done on Sundays."

The breach was not closed until May 28. It was only done then by abandoning the futile efforts (thrice repeated with disaster) of rebuilding the wall on its old line, and making a circular defence out on the saltings. The learned judge finds, and there is ample evidence to support his finding, that if the servants of the defendant board had started on this work with reasonable care and skill they could have closed this breach in fourteen days. In fact, owing to the negligent way they went about it, they only closed it in one hundred and seventy-eight days.

The judge has held that the defendants are liable to compensate the plaintiffs in damages for having caused or allowed the marshland to be flooded for one hundred and seventy-eight days, instead of stopping that flooding in fourteen days, as by the exercise of reasonable skill and diligence they might have done. The defendants appeal from this decision. If the defendants are so liable it must be because they owed a duty to the plaintiffs to exercise such skill and diligence. That they failed to exercise them, if it existed, there can be no question. So the only question in this appeal is whether that duty did arise.

I confess that I think the case law as to the duty and liabilities of a statutory body to members of the public is in a state of lamentable obscurity and confusion. Considering the diversity of objects with which such bodies have been created that is perhaps not surprising. Particular utterances of various judges as regards street lighting, or the running of a railway, may well be difficult of application to so different a matter as the upkeep of the banks of a tidal river.

I do not propose to examine these cases, or attempt to reconcile them. I have considered many of them. I believe the rules of law to be as follows: If a body or corporation is by statute empowered to do certain things but is not ordered to do them, a subject who suffers from their not being done has no cause of action against the body. He cannot say that they owed him any duty to do them. If on the receipt of Mr. Porter's letter of December 3 the board by their clerk had replied that they would not comply with his request to have the wall repaired, he would have had no ground of claim. He would have had to see his land ruined by the sea, or else get the Smiths to repair it at his expense.

The second rule, I think, is that if the body does exercise its power to do certain acts they owe a duty to any subject who, in his person or property, is affected by those acts, to exercise reasonable care, and are liable to him in damages if he suffers by their breach of that duty. In the early days of railways it was settled that though a railway was not liable for damage to crops caused by sparks from an engine simpliciter, yet if the sparks result from the engine not being constructed with reasonable care to prevent sparks they were liable for resulting damage. There seems the more reason to apply such a principle in a case where, as it is here, the act that is authorized is not merely to do something in the vicinity of the subject's land, but is actually to enter upon his freehold and do work upon it, whereby he is debarred from doing such work for himself.

The appellants recognize the soundness of this second rule, but seek to apply it only to a limited extent. In the course of the maladroit efforts of Studd and the casual labourers they threw quantities of bags of earth into the breach. These the tide took in its stride and spread them in dismal confusion over some two or three acres of the pasture. Mr. Beyfus agreed that for this damage to the plaintiffs' land the defendants were liable as for a breach of duty to do their work with reasonable care. But he argued that for the larger damages, resulting from the pasture being flooded for one hundred and seventy-eight days instead of fourteen, they were not liable. This he said was only the result of non-feasance, an abstention for this length of time from exercising their statutory power to mend the wall: it cannot be called

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misfeasance (to repeat the catchwords of the cases), that is the breach of a duty to exercise reasonable care in the exercise of those powers.

I cannot accept this contention. If a plumber be summoned to mend a leak in a metal pipe he need not obey the summons; he is under no duty to do so. But if he does undertake the job he must exercise the proper skill of a plumber in his work. If over and over again he tried to stop the leak with putty instead of solder, and over and over again the force of the water blew out the putty, and the house continued to be flooded, he would clearly be liable for a breach of duty. The appellants here intimated to Mr. Porter that they were going to exercise their statutory power under the Act of 1930, that is to come upon his land and do work upon it. If Mr. Porter had known all he now knows it is possible that he would have said he would rather do it himself: in which case I suppose the appellants could have got an injunction to prevent him interfering with their statutory powers. But in any case they chose to exercise their power, and undertook to do this work. The essential part of the work was that it should be done as speedily as possible. If postponed till the flood had killed all the vegetation, and ruined the pasture, it might as well not be done at all. When therefore the appellants elected to exercise their powers, and do work on the respondents' land, I think they assumed the duty of doing that work with as much expedition as was consistent with the exercise of reasonable skill, care, and diligence. The learned judge has found that they did not fulfil this duty. There was ample evidence on which he could so find. And I agree with his findings. I therefore think that his judgment awarding damages to the respondents was right, and that this appeal should be dismissed with costs.

du Parcq L.J. In this case the defendants are the East Suffolk Rivers Catchment Board, a body deriving its powers from the Land Drainage Act, 1930. The plaintiff Porter is the owner, and the plaintiff Kent is the tenant, of certain marshlands adjoining the river Deben which are within the defendants' catchment area. On December 1, 1936, the combination of a high tide and a fierce northerly gale caused a breach in the wall protecting this land. The defendants set to work to re-build the wall. It was not until May 28, 1937, that they finally succeeded in keeping back the water from the marshlands. The learned judge has found that the defendants went to work in the wrong way, and that success would have been achieved in a much shorter time "if the "right method had been adopted with efficient men and "sufficient numbers of men and adequate materials." The principal question for our decision is whether in these circumstances the defendants are under any legal liability to the plaintiffs. The further question whether the evidence supported the learned judge's findings of fact was also argued before us, but does not arise if the question of law is answered in favour of the defendants.

In order to deal with the point of law it is not necessary to state the facts in any detail. The statement of claim alleged (1.) that it was the duty of the defendants to repair the wall in question and to keep it in repair, (2.) that after the river had broken through the wall "the defendants as was "their duty . . . . commenced to repair the said wall but in "breach of their duty to do the same efficiently and with the "utmost expedition possible the defendants took no steps so to "repair the said wall and failed and neglected to see that "sufficient labour was employed or continuously employed or "that proper or any supervision was given thereto or that "proper or any adequate methods were adopted to mend the "breach in the said wall and clear the said marshland of "water within a reasonable time or at all in consequence "whereof such flooding has continued for many months." Lengthy particulars were delivered later which stated the manner in which, according to the plaintiffs, the work should have been done, and included an estimate that the whole work could have been completed in six weeks.

The learned judge rejected the contention that the defendants were under a duty to repair the wall, following and approving the view expressed by Stable J. in *Gillett* v. *Kent Rivers*

Catchment Board. (1) The plaintiffs did not contend before us that this part of the learned judge's decision was wrong, and the argument on both sides went on the assumption that it was right. The position of a catchment board under the Land Drainage Act, 1930, was stated by Stable J. in the following words from the case cited: "When I say that it"—the Act—"does not impose a duty on the board at all, I "mean that it does not impose on the catchment board a "duty in relation to farmers who live inside the area, so as to "create a right of action at the suit of those farmers if the duty "is not discharged." If these words are read according to the learned judge's obvious intention, and for "farmers who "live inside the area" one substitutes the words "individual "members of the public," I am of opinion that this is a precisely accurate statement. A board which fails to exercise its powers may be directed to exercise them by the Minister (see s. 12 of the Act), and then, as Stable J. pointed out, it does become "the duty" of the board to comply with the Minister's directions. It is common ground in the present case that, at least until the defendants began to do the work, they were under no duty to the plaintiffs, and in my opinion the language of s. 34 (which must be read in conjunction with s. 81, the definition section) makes it plain that the view adopted by Hilbery J. and Stable J., and not disputed at the bar, was so far correct. It is perhaps as well to add that for the purposes of this case s. 34, sub-s. 3, of the Act, which gives a statutory right to compensation, may be disregarded as being irrelevant.

The difficult question remains whether the fact that the defendants did exercise their powers, and, as the learned judge has found, did not exercise them with reasonable skill and diligence, puts them under a liability which they could have avoided by remaining passive. It is said, on the one hand, that if they are under no duty to the plaintiffs to take any action at all to save the plaintiffs' lands from damage, they cannot have come under a liability to the plaintiffs because they were too slow and not as efficient as they ought to have been in the action which they did take. The plaintiffs on the other hand contended that if the defendants chose to exercise their statutory powers, and exercised them without due skill and care, they were liable for the consequence of their neglect to anybody who suffered by reason of it.

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(1) [1938] 4 All E. R. 810, 813, 814.

In my opinion the troublesome question which is raised by these contentions is best approached by considering what right, if any, is given to the individual landowner by the statute from which the public body whom he sues derives its powers. If the statute confers no right on the landowner, or in other words imposes no duty towards the landowner on the public body, it follows that unless the public body has infringed some common law right of the landowner, no action lies against it at his suit. Thus a catchment board which, ex concessis, is under no statutory duty to landowners within its area, is never liable to one of them either for a total neglect to exercise its statutory powers or (if no more is proved) for exercising them with a lack of efficiency or with too little zeal or dispatch. On the other hand, in so far as it is possible to exercise the statutory powers without inflicting injury on landowners or other members of the public, there is a common law duty on the board so to exercise them. In this respect the board is in much the same position as an occupier of land who may do what he likes with his own, provided that he does not wrongfully injure others. It must, so far as is reasonably possible, exercise its statutory powers in such a manner as not to inflict any injury on others. If it does some avoidable injury to a member of the public through lack of care or skill, which he would not have suffered if it had remained passive, then it is liable to pay him damages. It is no less liable for a trespass or any other invasion of a person's common law rights which the statute does not justify. On the other hand, it is not liable for damage suffered through failure to exercise its powers adequately or at all, even though the damage might have been averted or lessened by the exercise of reasonable care and skill.

I believe this statement of the law to be consistent with, and to be supported by, the authorities. Unfortunately it is

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difficult, and perhaps impossible, so to state the principle that the statement, if torn from its context, or not read secundum subjectam materiam, will be proof against misunderstanding. The well-known words of Lord Blackburn in *Geddis* v. *Bann Reservoir Proprietors* (1), which I need not repeat here, have been quoted before now to support a proposition to which in truth they give no support—namely, that a public body owing no duty to render any service may become liable at the suit of an individual, if once it takes it upon itself to render some service, for failing to render reasonably adequate and efficient service. (Compare *Sheppard* v. *Glossop Corporation* (2) per Scrutton L.J. (3))

The law would perhaps be more satisfactory, or at any rate seem more satisfactory in some hard cases, if a body which chose to exercise its powers were regarded as being in exactly the same position as one upon which an Act of Parliament imposed a duty. On the other hand, it must be remembered that when Parliament has left it to a public authority to decide which of its powers it shall exercise, and when and to what extent it shall exercise them, there would be some inconvenience in submitting to the subsequent decision of a jury, or judge of fact, the question whether the authority had acted reasonably, a question involving the consideration of matters of policy and sometimes the striking of a just balance between the rival claims of efficiency and thrift.

If I have stated the law correctly, it follows in my opinion that on any possible view of the facts the plaintiffs made out no case against the defendant board upon the cause of action pleaded. The learned judge has found that the board should have employed more and better workmen, and that the attempt to build a dam straight across the breach instead of erecting a coffer-dam was foolish and foredoomed to failure, but all this only amounts to "negligence," according to the legal connotation of the word, if the board was under a duty to the plaintiffs to do work intended for their benefit with efficiency and dispatch. In my view it was under no such duty. Let it be granted that, in a time of great stress, its failure to mass sufficient forces of men and material at one breach out of many in the walls, or to adopt a safer method of damming the waters, is evidence of incompetence or folly. It still cannot be said that any common law right of the plaintiffs has been invaded. The defendant board was empowered by the Act to do the work and to enter on the land of the plaintiffs in order to do it. (Sect. 34, sub-s. 4.) It has neither done anything which it owed the plaintiffs a duty not to do, nor omitted to do anything which it owed them a duty to do. At most it can be said that it has not exercised its powers so as to give them that speedy protection which they might well expect but had no legal right to demand.

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(1) 3 App. Cas. 430, 456.

(2) [1921] 3 K. B. 132.

(3) [1921] 3 K. B. 145, 146.

I may be allowed to add that the case of *Smith* v. *Cawdle Fen Commissioners* (1) is in my opinion directly in point here. In that case (where earlier statutes had to be considered) the defendants, like this defendant board, were under no statutory duty to the plaintiffs. I was very ready to listen to any argument directed to persuade this Court that the decision in that case was wrong, but it seemed to be conceded that it was right, and it was certainly approved by Stable J. in the case cited above. If it was right, it is, I think, conclusive in the appellants' favour.

It was further contended, however, that but for the intermeddling of the defendant board, one or other of the plaintiffs would have done the necessary work himself, at his own expense, and done it much better than did the board. This may be true. Nobody, I think, can be certain about it, and the evidence is not, to my mind, conclusive. I will assume that some cause of action could be based on the allegation that the plaintiffs were induced or compelled to abstain from helping themselves by the futile and misguided attempts of the defendant board to help the community, but no such cause of action was pleaded or investigated at the trial, and in my opinion it is too late for the plaintiffs to seek to rely on it now. The measure of damages in such an action would be

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(1) [1938] 4 All E. R. 64.

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a matter for careful consideration. Then it was said that the defendants might well be liable on the well known principle of *Wilkinson* v. *Coverdale.* (1) I understand that case to have decided that a person who undertakes to do work for another gratuitously may be liable in damages to that other if he does the work negligently. All that need be said on this point is that it was neither proved nor alleged that the defendants ever undertook any obligation to the plaintiffs. The defendants were acting not for the plaintiffs, but, it must be assumed, for the common good. They never entered into any sort of contractual relationship with the plaintiffs, whether express or implied.

It remains to deal with one other matter which assumed some importance during the argument before us. It appeared from the evidence that in doing the work which they undertook the defendants, by carelessly constructing the dam, (1.) caused the deepening of a hole or pool which the scouring of the water had already produced in the plaintiffs' land, (2.) caused a large number of sandbags to be deposited on the plaintiffs' land. If the statement of claim had alleged that the defendants had done this positive injury to the plaintiffs it is conceded by the defendants' counsel that they would have had no answer to a claim for damages in respect of it. It would indeed have been difficult to find a better example of that class of cases in which, if the view of the law which I have expressed be sound, a catchment board is liable to a landowner. Counsel for the defendants says that if that claim had been pleaded they would have paid into Court a sum which might have satisfied it. When regard is paid to the small value of this marshland, it does not seem likely that the sum paid in need have been very large when compared with the damages which would be payable if the plaintiffs were entitled to succeed on their case as pleaded. In the circumstances, no application having been made to the judge at the trial to amend the pleadings, this Court was unanimously of opinion that we ought not to allow such an amendment now. On the pleadings as they stand, I am

(1) 1 Esp. 75.

satisfied that it is not open to the plaintiffs to use a comparatively trivial part of the evidence relating to the damage suffered in order to convert the action for failure to take proper steps to prevent flooding into an action for the infringement of a common law right.

For the reasons which I have stated I am of opinion that this appeal ought to be allowed and that judgment should be entered for the defendants, but as the majority of the Court have expressed the view that the judgment of the learned judge should be upheld, the appeal must, of course, be dismissed.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors for appellants: *Sharpe, Pritchard & Co., for Cobbold, Sons & Menneer, Ipswich.*

Solicitors for respondents: *J. R. Welch, Son & Algar, for Turner, Martin & Symes, Ipswich.*

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STIMPSON *v.* STANDARD TELEPHONES AND CABLES, LIMITED.

[1939. S. 2105.]

Master and servant—Employer and workman—Accident—Infant workgirl—Dangerous machine—Hand caught in machine—Employers' breach of statutory duty—Breach a cause of the accident—Receipt of compensation under the Workmen's Compensation Act—Remedy under that Act not for benefit of infant—No bar to action for damages—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 10—*Workmen's Compensation Act,* 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 29, *sub-s.* 1.

When a workman meets with an accident and is injured while operating a dangerous machine in a factory which the employer has left unguarded in breach of s. 10 of the Factory and Workshop Act, 1901, the workman is entitled to recover damages if, in the absence of a finding of contributory negligence, it is established that the accident could not have happened had the machine been left guarded, as in a case where the workman's hand is caught in the unfenced part of the machine.

Caswell v. *Powell Duffryn Associated Collieries, Ld.* [1940] A. C. 152 applied.

A workgirl, who was under twenty-one years of age, sustained personal injury as the result of an accident while working on a dangerous machine left unguarded in breach of s. 10 of the Factory and Workshop Act, 1901, and acting on advice she claimed through her father and was paid compensation under the Workmen's Compensation Act, 1925:—

Held, that although an adult would be debarred by s. 29, sub-s. 1, of the Act of 1925, from recovering damages independently of that Act in respect of the statutory breach, the infant workgirl was not so debarred unless the Court came to the conclusion that it was for the benefit of the infant that she should obtain compensation under the Act of 1925 instead of damages independently of that Act.

Perkins v. *Hugh Stevenson & Sons, Ld.*, ante p. 56, distinguished.

APPEAL from Hilbery J. sitting without a jury.

The defendants were the occupiers of a factory at Oakleigh Road, New Southgate, and the infant plaintiff, Hilda Violet Stimpson, was in their employment, and met with an accident on April 15, 1935, while operating a drying machine. The machine was used to dry blue prints and other documents reproduced by photographic processes. The machine consisted of a drum mounted on a stand and covered with a material like canvas sheeting under tension. Near to the top of the front of the drum and across its full width was a roller, round which from other rollers situated directly above and behind the machine there came a continuous sheet of the same material. This material made contact with the drum about six inches behind the front roller. When the machine was running the drum was electrically heated and revolved slowly at the rate of only one inch per second. On April 15, 1935, the plaintiff, while operating the machine, had her left hand caught between the surfaces of the fabric and severely burnt. She could not reach the switch to stop the machine, but on her calling out, another operator did so at once. At the time of the accident the plaintiff was about fourteen and a half years old and had been in the defendants' employment from November, 1934. There was no finger guard on the drying machine.

After the accident the plaintiff by her father, William Stimpson, claimed and received weekly payments of compensation under the Workmen's Compensation Act, 1925, from the date of the accident until March 19, 1936, when she was offered light work but refused it. The plaintiff's father was a clerk in the office of solicitors. In April, 1935, he had consulted them about the plaintiff's situation and he and the solicitors both then thought that the proper thing in the plaintiff's interest was for her to take the payments under the Workmen's Compensation Act.

On July 6, 1937, the infant plaintiff and her father brought these proceedings claiming damages for her personal injury and 17*l.* 2*s.* special damages on the ground of the defendants' negligence or breach of duty. Hilbery J. found that there had been no negligence, and the only two of the alleged breaches of statutory duty that need be referred to were (1.) that the defendants had failed adequately to fence the machine or otherwise render its operation safe for a person of the age of the infant defendant in breach of s. 10 of the Factory and Workshop Act, 1901; and (2.) that they had failed to have the switchboard for stopping the machine within reach of the operator contrary to the Electrical Regulations, reg. 12.

The defendants by their defence denied that the machine was dangerous, and in any case contended that by virtue of

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s. 149, sub-s. 4, of the Act of 1901, the room where the accident happened was not to be deemed to form part of a factory for the purpose of the Act. They also alleged contributory negligence; and lastly, relied on s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, as barring this action, because it was thereby provided that an employer was not to be liable for injury to a workman by accident arising out of and in the course of the employment both independently of and also under the Act.

Hilbery J. [after deciding that there had been no negligence and on the facts that the alleged breaches of statutory duty, other than those mentioned above, had not been established] said that there had been in his view a breach of the Electricity Regulation, but that he was not satisfied that even if the switch had been more accessible it would have been switched off any sooner. The gravamen of the plaintiff's case was, however, that there had been a breach of s. 10 of the Factory and Workshop Act, 1901. The plaintiff must first, however, establish that at the time of the accident the female plaintiff was at work in a non-textile factory within the definition in the Act. [He then proceeded to consider the relevant facts and authorities and came to the conclusion that the room where the female plaintiff was employed was a non-textile factory within the definition.] The next matter in issue was whether the machine was dangerous. The test to be applied was to be found in the judgments of Wills J. in *Hindle* v. *Birtwistle* (1) and of du Parcq J. in *Walker* v. *Bletchley Flettons, Ld.* (2) In applying this test he had to remember that the machine was being worked by a girl in her fifteenth year and that it was ordinarily worked by a girl of about that age and the contingency of the carelessness such a girl would be likely to exhibit had to be taken into account. The evidence showed that normally the top of the wet print would be put on the drum at a point about six or seven inches below the top roller, so that an interval of about ten seconds would elapse before a hand holding the print would be caught in the nip between the upper canvas and the drum. But

(1) [1897] 1 Q. B. 192.

(2) [1937] 1 All E. R. 170, 175.

there was nothing to prevent the girl from applying the top of the print closer to the roller and if she did this and tried to smooth it with her fingers to force the top of the print to adhere to the drum along its full length and in doing so put her hand too far under the roller, she might well get it nipped. It followed that the machine must be classified as dangerous. There was therefore a breach by the defendants of their statutory duty to fence the machine.

The matter did not end there, and the question was whether the female plaintiff had the onus upon her of proving that the accident and injury were caused by the breach of statutory duty, or whether it was enough that she should prove a breach of statutory duty and an accident and injury which but for the existence of the breach of duty could not have occurred. Here the plaintiff professed to be unable to say how the accident occurred, but after observing her carefully he had become convinced that she could have said how it happened if she had wished. So far as the plaintiff's evidence went she might have put her hand between the canvas running round the roller and the drum deliberately. Her denial that she did so could not be relied on. The breach of the statutory duty established was not therefore shown to be any more than a causa sine qua non, and if it was for the plaintiff to show that it was the causa causans she must fail.

There was no authority directly on this point, but there were dicta and decisions which seemed to indicate the views hitherto held by judges. [He referred to *Groves* v. *Lord Wimborne* (1) and *Blenkinsop* v. *Ogden.* (2)] The defence of contributory negligence in such an action as the present still afforded an answer in law to the claim (see *Flower* v. *Ebbw Vale Steel, Iron and Coal Co.* (3) and *Lewis* v. *Denye* (4)); and, if so, it must be because it broke the chain of causation and left the plaintiff's case unproved. The result was that in the present case the plaintiff had to prove that the cause of the injury was the defendants' breach of absolute statutory duty. He thought the infant plaintiff in this case had not

(1) [1898] 2 Q. B. 402, 412.
(2) [1898] 1 Q. B. 783.
(3) [1936] A. C. 206, 215.
(4) [1939] 1 K. B. 540.

discharged the burden upon her, and he was of course saying this after considering not merely direct evidence but whether there was sufficient material to establish her case inferentially. He accepted the evidence of the defendants' witnesses that on the print which the plaintiff was drying at the time of the accident was found a sweet similar to those in the packet she had in her left hand. He was satisfied that the plaintiff knew that eating during working time was not allowed. The sweet on the print might have come from the packet after the infant plaintiff's hand was caught ; or it might have been observed by the plaintiff to have got on to the print just as it had passed under the roller and the accident have happened as she was trying to retrieve it. The infant plaintiff had therefore failed to establish that the cause of her mishap was the failure of the defendants to fence. On the other hand he did not think there was sufficient evidence to enable him to say definitely whether there was or was not contributory negligence.

In the circumstances it was unnecessary to decide the question arising under the Workmen's Compensation Act, 1925. If he had found in the plaintiff's favour he would have awarded to the infant plaintiff 750*l.* damages and to her father 17*l.* 2*s.* special damages.

The plaintiffs appealed. The appeal was heard on November 1 and 2, 1939. The point was not raised by the respondents on the appeal that the room where the infant plaintiff was working was not a factory within the Act of 1901, and on the view taken by the Court it became unnecessary to hear argument on the question whether there had been a breach of statutory duty in regard to the position of the switch.

Aiken Watson for the appellants. In view of Hilbery J.'s findings that the infant plaintiff was working at a dangerous machine when she met with the accident and that the employers had been guilty of a statutory breach in leaving the machine unguarded, and further that there was not sufficient evidence of contributory negligence, the question that arises is whether Hilbery J. was wrong in holding that in the absence of evidence that the statutory breach was the causa causans of the accident he must decide against the appellants. It is clear that the dangerous machine materially contributed to the accident, for in its absence the accident could not have occurred, and that is sufficient: *Caswell* v. *Powell Duffryn Associated Collieries, Ld.* (1) This recent decision of the House of Lords deals with the whole law on the subject and makes it unnecessary to refer to the earlier case cited by Hilbery J. in his judgment.

F. A. Sellers K.C. and *Martin Jukes* (for *Alun Pugh* on war service) for the respondents. The first ground of defence is that the infant plaintiff has been receiving compensation under the Workmen's Compensation Act, 1925, and that is a bar to this action by virtue of s. 29, sub-s. 1, of the Act. That would be clearly so in the case of an adult: *Perkins* v. *Hugh Stevenson & Sons, Ld.* (2), but the Act is one that applies equally for the benefit of the infant and adult workman, and a person taking the benefit of the Act is bound by its provisions: see also *Selwood* v. *Townley Coal and Fireclay Co.* (3) Here there was a clear claim for compensation by Mr. Stimpson, the infant plaintiff's father, and the claim for compensation was made on the advice of the solicitors whose clerk Mr. Stimpson was. Further, the receipts were given sometimes by the father and sometimes by the mother. The evidence shows that the infant knew she was receiving compensation under the Workmen's Compensation Act. The solicitors advised what they thought best for the infant and decided that it was to obtain compensation under the Act.

[DU PARCQ L.J. Is it not for the Court to decide whether it was for the infant's benefit to receive compensation under the Act or recover damages independently of it?]

It is not, it is contended, necessary to go into the question whether the receipt of compensation under the Act was for the infant plaintiff's benefit, as she has taken the benefit of the Act. But in any case it clearly was for her benefit and in taking the course she did she was acting under competent

(1) [1940] A. C. 152
(2) Ante p. 56.
(3) Ante p. 180.

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advice. This case is different from one of contract, and an infant workman is in exactly the same position as any other workman in regard to the Workmen's Compensation Act, 1925. [He referred to *Murray* v. *Schwachman, Ld.* (1)] If there had been an actual award here it is clear that the infant would have been bound: see *Stephens* v. *Dudbridge Ironworks Co.* (2); and the position is the same under s. 29 of the Act. The soundness of the view taken by the infant's advisers here is shown by the uncertainty of litigation independently of the Act of 1925, especially as the case related to a crawling machine in which it was almost impossible for any one to be caught accidentally.

[He referred also on this part of the case to *Flower* v. *Ebbw Vale Steel, Iron and Coal Co.* (3) and *Higgins* v. *Harrison.* (4)]

Secondly, the machine was not a dangerous machine. The test applicable in ascertaining this is laid down in *Hindle* v. *Birtwistle* (5) and *Walker* v. *Bletchley Flettons, Ld.* (6) The plaintiff gave no account of the accident to show how it could reasonably have occurred. The machine was subject to inspection by factory inspectors and it was known to be used by children. The drum took ten seconds for the print, when the prints were normally applied, to reach the nip between the roller and drum. The fair inference is that the child intended to put her hand under the roller, possibly to rescue a sweet that was afterwards found attached to the print on which she was working.

Next, on the question of contributory negligence, there is good ground for saying that Hilbery J.'s finding of facts sufficed to establish contributory negligence. He was wrong in thinking that there was not enough evidence to establish contributory negligence.

Lastly, the learned judge was right in finding that there was not sufficient causal connection between the negligence of the employers in leaving the machine unguarded and the accident.

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(1) [1938] 1 K. B. 130.
(2) [1904] 2 K. B. 225.
(3) [1936] A. C. 206.
(4) (1932) 25 B. W. C. C. 113.
(5) [1897] 1 Q. B. 192.
(6) [1937] 1 All E. R. 170.

[MacKinnon L.J. Is it not enough that the girl got her hand caught in the unfenced part of the machine ?]

No. The Court has to see whether the accident was caused by the employers' negligence. It is not enough that this negligence should be a causa sine qua non. *Caswell's* case (1) must be carefully scrutinized and regard be had to *Wakelin* v. *London and South Western Ry. Co.* (2)

Aiken Watson for the appellant replied.

Sir Wilfrid Greene M.R. In this case I shall confine my remarks to those matters which have been argued before us ; and I shall not rehearse the facts of this case because they are for present purposes sufficiently stated in the judgment of the learned judge.

There is one matter which I can get rid of at once—namely, the question whether or not the machine in question was a dangerous machine, so as to impose upon the employers a duty of fencing under s. 10 of the Factory and Workshop Act. On that matter the learned judge found in favour of the plaintiff. We have had various matters urged upon us by Mr. Sellers, with a view to persuading us that that finding was wrong. It is sufficient for me to say that the reasoning of the learned judge on that point commends itself to my mind ; and I think his finding was not only justified, but right.

I therefore approach this appeal on the footing that the particular machine was a piece of dangerous machinery which the employers were under a statutory obligation to fence. That statutory obligation they did not carry out. The plaintiff unquestionably suffered her injury through her hand being crushed between the stretched canvas and the drum of the machine. It is not disputed that, if the machine had been fenced, as it could well have been, the accident would not have taken place. On those matters there is no dispute at all. The precise circumstances in which the hand came to be in that place were not established in such a way as to enable the learned judge to come to any definite finding upon that matter.

On that basis of fact, the learned judge held that, although

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(1) [1940] A. C. 152.

(2) (1886) 12 App. Cas. 41.

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there was negligence on the part of the employer in not providing the fence, it was not established to his satisfaction that the failure to provide the fence was the cause of the accident. In my opinion, the learned judge did not apply the true principle of law applicable to matters of this kind. When an employer places upon his premises for use in his factory a dangerous machine unfenced, he is by that act alone being negligent towards the employees in general, or towards such of them as might find themselves in the neighbourhood of the machine. But that, so to speak, is negligence in the air, just as driving a motor-car negligently on the road is negligence in the air. No right of action arises unless and until some person to whom a duty to take care is owed suffers some damage attributable to that negligence. In the present case, as I have said, the part of the machine that caused the injury was a dangerous part of the machine. The injury would not have been caused if the statutory duty had been performed. In my judgment, those two circumstances together are sufficient to establish the necessary causal connection between the negligence of the employer and the injury suffered by the plaintiff.

When that stage is reached, and not until that stage is reached, does the further question arise: Aye or No was the plaintiff guilty of contributory negligence in such a way as to deprive her of the right to recover? In my opinion, it is incorrect to treat the necessity of proving causal connection between the breach of duty and the accident as though that were the same thing as saying that the plaintiff must establish that the accident took place otherwise than by some intentional act on her part. The learned judge in my view went wrong in that respect.

I have put quite shortly in my own words what I understand to be the principles applicable on the facts of this case; and I will cite one or two short passages from the speeches in the House of Lords in the case of *Caswell* v. *Powell Duffryn Associated Collieries, Ld.* (1) Those passages, taken in their context, and in the light of the facts of that case, appear to me to be in accordance with what I have said, and to justify the proposition which I have advanced.

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(1) [1940] A. C. 152.

First I find this in the speech of Lord Macmillan (1): "The mere fact that at the time of an accident to a miner "his employers can be shown to have been in breach of a "statutory duty is clearly not enough in itself to impose "liability on the employers. It must be shewn that the "accident was causally associated with the breach of statutory "duty." I take that to mean this. Adopting an example put by MacKinnon L.J. in the course of the argument, it would not be sufficient to show that a workman was found in the neighbourhood of a dangerous machine unconscious, with a wound upon him which might have been caused by the dangerous part of the machine, or might have been caused in some other way by the use of, for instance, a hand tool which the workman had to use. If that were all that appeared, then, although the breach of statutory duty would be established, it would not be shown that the accident was causally associated with the breach of the statutory duty, because the facts would be equally consistent with it having been due to some other cause.

Lord Macmillan (2) later proceeds thus: "While the precise "manner in which the deceased met his death remains "unascertained because there was no eye-witness of the "accident, it has been proved to demonstration that if it "had not been for the respondents' breach of their statutory "duty the accident would not have happened. The respondents' "breach of duty was clearly a cause of the accident. Having "thus causally connected the accident with the respondents' "breach of duty, I do not think that it was incumbent on the "appellant to eliminate and disprove all conjectural possibilities "that the deceased may himself have been in some way careless "of his own safety." Those passages show quite clearly what Lord Macmillan means by the causal association, the establishment of which is sufficient to connect the accident with the breach of duty. Lord Wright (3) says this: "It is, in my

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(1) [1940] A. C. 168.
(2) Ibid. 169.
(3) Ibid. 171.

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"opinion, clear that if at the material time the machine had "been fenced, the man could not have been killed, or even "come to any serious harm. His death was caused by the "absence of fencing. Merely to slip, unless in proximity to the "unfenced machine, would have caused at most a bruising or, "by very bad luck, perhaps a broken bone. The actual death "was caused because the man was drawn into the open space "—that is, it was caused by the want of fencing." Then Lord Porter (1) says: "Undoubtedly the absence of the guard "contributed to the injury which caused the death of the "workman. Had the guard been in its place the accident "would not have happened." I have extracted from those opinions the view of the law applicable to the facts of this case, which I have shortly stated; and, therefore, I find myself unable to agree with Hilbery J.'s finding on that matter.

The next question which arises is that of contributory negligence. The burden of establishing contributory negligence, of course, is upon the defendants. In that respect the learned judge was unable to find, on his view of the evidence, that contributory negligence had been established. Mr. Sellers called our attention to several circumstances in the case from which he said the learned judge ought to have drawn the inference that the substantial cause of this injury was not the breach of duty, but the actual contributory negligence of the plaintiff herself. I have carefully considered the various matters put before us by him; and I do not find myself able to differ from the conclusion to which the learned judge came upon that part of the case. It is perfectly true that the girl did not, although pressed, vouchsafe to give an explanation of how the accident happened; and the learned judge took the view that she could have explained it if she had wished: but that does not mean that he was bound to draw an inference against her to the effect that she had been guilty of some act or other which was the substantial cause of the accident. After seeing her and weighing all the evidence, the learned judge came to the conclusion that

(1) [1940] A. C. 183.

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contributory negligence was not established, and I cannot see my way to differ from that finding.

The only other questions which fall for decision are two which arise by reason of the circumstance that the plaintiff or her legal advisers and her father on her behalf applied for, received and accepted as such, payments under the Workmen's Compensation Act. It is, I think, clear that the advisers of the plaintiff (in which I include the solicitors and her father) did in fact claim those payments and receive them on her behalf, receiving them with the full knowledge that they were, and with the intention that they should be, Workmen's Compensation Act payments.

It is said that, once that circumstance is established, it follows from the decision of this Court in *Perkins* v. *Hugh Stevenson & Sons, Ld.* (1) that the plaintiff cannot thereafter resile and demand damages at common law. It is contended that once you find that money has been paid under the Act for the purpose of discharging a liability under the Act, that is enough; and the fact that the recipient is an infant has nothing to do with the matter. In my opinion, the authority of *Perkins* v. *Hugh Stevenson & Sons, Ld.* (1) does not assist the respondents in this case. That was a case of an adult who had made a claim under the Act, and had accepted money under it. The question which we had to consider in that case is in my judgment as follows (2): "What is to happen "where the workman, having at the time of making his claim "and receiving the money ex hypothesi no knowledge of his "right of option, nevertheless receives and puts into his "pocket money paid in pursuance of that claim and in "liquidation of the employer's statutory liability under the "Act?" In other words, we were dealing there with a case where the quality of the payment made by the employer was between the parties irrevocably fixed as a payment under the Workmen's Compensation Act in discharge of the employer's liability. In my opinion, in order that a payment may have that quality, it is not sufficient that there should be a mere passing of money from the employer to the employed: nor

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(1) Ante p. 56.

(2) Ante p. 64.

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is it sufficient that the passing of that money should be accompanied by an intention in the mind of the employer alone that the payment should be a Workmen's Compensation Act payment. In order that the payment may have the necessary quality to operate as a discharge of the liability of the employer, it must be paid as a Workmen's Compensation Act payment and it must be received also in that quality.

In the case of adults, no difficulty arises in dealing with that particular matter. But, in the case of an infant, when once it is clear that in order to find the requisite quality in the payment a mental operation on the part of the recipient is required, the question arises: Was it for the infant's benefit that that particular decision should be taken? If the payment was made under an agreement, if the parties rested not merely on the statutory position but also on a contractual position, it is clear that the question of the infant's benefit becomes immediately relevant. That appears from the case of *Stephens* v. *Dudbridge Ironworks Co.* (1), and from *Murray* v. *Schwachman, Ld.* (2) In my judgment, quite apart from cases involving an actual contract, where there is need of a mental operation of the infant, whether it is in the exercise of the option before receiving payment, or whether it is looked at from the point of view of actual receipt of payment, the question must always be investigated, was it for the infant's benefit that the payment should be made? I find nothing in the judgment in *Perkins* v. *Hugh Stevenson & Sons, Ld.* (3), or in the later case in this Court in which that judgment was followed, which in any way supports the view put forward by Mr. Sellers.

That leaves one question only, which is this: Is it or is it not shown that the decision to take these payments as payments under the Act, and accept them as such, was for the infant's benefit? Questions of that kind are often difficult to answer. The learned judge in the present case, although it was not necessary for him so to find, in view of his decision on the main part of the case, nevertheless took

(1) [1904] 2 K. B. 225.
(2) [1938] 1 K. B. 130.
(3) Ante p. 56.

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the view that it was not for the infant's benefit. In my opinion, he was right upon that. The test must be applied, of course, at the relevant date. In this case the relevant date was the date when the first payment was made in pursuance of the claim which had been put forward. That was very shortly after the accident, at a time when the full result of the accident was not apparent. That full result only became apparent some time later; and in point of fact has resulted in permanent incapacity owing to the condition of the thumb. It has also resulted in a permanent disfigurement which, to a young lady of that age, may be a source not merely of annoyance, but also of substantial loss of happiness in life hereafter.

The task which the Court has to perform in these cases is to put itself in the chair of a hypothetical adviser who would be advising the infant, with knowledge of all the facts which were known at that time, and with a competent knowledge of the law. I think that way of approaching the question is justified by what was said in this Court in the case of *Murray* v. *Schwachman, Ld.* (1) in the judgment of Greer L.J. With that view of the matter the other members of the Court concurred.

Putting myself in that position as best I can, I would have to consider what the legal risks in the matter were, and what the chances of failure in a claim at common law. The two matters in respect of which it is suggested there would have been doubt on legal questions, are first of all the question of liability and the proof requisite in cases of breaches of statutory duty; and, secondly, the applicability or otherwise of the doctrine of contributory negligence to such cases. It is perfectly true that, at the relevant time, the House of Lords had not yet declared that the doctrine of contributory negligence applied to such cases; but it had been so held some years before by this Court; and it was generally considered, I think, that that decision would be upheld if and when the House of Lords came to deal with the matter. I do not find there any legal problem which would have given a

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(1) [1938] 1 K. B. 130, 146.

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competent adviser any difficulty. On the other question, I am again unable to see that the hypothetical adviser would have found it impossible or difficult to give correct advice upon the matter.

Looking at the factual aspect of the case, here was a young girl at the beginning of life, suffering what has turned out to be not merely a permanent incapacity, which would or might affect her earning power, but also an injury which would affect her appearance and might affect her ability to play games and generally enjoy life in other respects, matters which do not come into account in assessing compensation under the Workmen's Compensation Act, but which can be taken into account in a claim at common law. Workmen's compensation is based, and based only, on earning capacity, and has nothing to do with these other heads of damage. One must remember also that a workman who commences proceedings at common law does not thereby forfeit his right to compensation under the Act; because if he fails to establish a case at common law, but establishes facts which would entitle him to compensation under the Act, he can obtain that compensation, subject to the risk of costs being deductible from the compensation assessed in his favour.

Taking all those considerations into account, not attributing to the hypothetical adviser any extraordinary prescience or wisdom, I cannot help thinking that the proper and sound advice which should have been given to this infant at that time should have been that she had better take proceedings at common law, and not accept payment under the Workmen's Compensation Act.

These questions are always difficult; and different minds may take different views of the facts of any particular case. I have done my best to assess the various matters which I think it proper to take into account; and that is the conclusion to which I have come, after listening to the arguments, very carefully, in this regard as in all others, put before us by Mr. Sellers.

In the result the appeal must be allowed, with costs here and below. No attack has been made upon the figure of damages assessed by the learned judge; and there must be judgment for the plaintiff for the figure which the learned judge assessed, subject to this one thing: that the plaintiff is willing to submit to deduction from that amount of the sum received under the Workmen's Compensation Act, a matter of 22*l.* as against a figure of, I think, 750*l.* assessed by the learned judge. That deduction of 22*l.* is agreed to by counsel on behalf of the plaintiff; and, therefore, there is no necessity to enter into a discussion of the question, which might be an interesting one, whether or not, by any legal machinery, this plaintiff could be forced to repay that amount, or give credit for it in the action. That investigation we are freed from, in view of the fact, as I have said, that that is conceded here.

MACKINNON L.J. I agree. I do not wish to repeat anything which has been said by the Master of the Rolls; but I am tempted just to say a word about the very last matter that he referred to. This Court, in the two cases of *Perkins* v. *Hugh Stevenson & Sons, Ld.* (1) and *Selwood* v. *Townley Coal and Fireclay Co.* (2) came to the clear conclusion that if an adult accepted payment under the Workmen's Compensation Act of compensation paid as such and received as such, that debarred him, under s. 29, from subsequently bringing any action at common law.

So far as I was concerned, one of the reasons that seemed to me conclusively to lead to that result in *Perkins* v. *Hugh Stevenson & Sons, Ld.* (1), was the fact that the plaintiff there, who was making the claim, had received 81*l.* in the guise of that compensation. If he had succeeded in the action that he was then bringing at common law, I could see no legal ground on which the employers could claim that money back. If that were so, the result appeared to me to be a clear breach of the provisions of s. 29 of the Act of 1925, which says that an employer shall not be liable to pay compensation both independently and also under the Workmen's Compensation Act, because he would have then paid

(1) Ante p. 56.

(2) Ante p. 180.

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compensation and been called upon to pay again outside the Act.

There was also in existence the principle previously laid down by this Court in the two cases of *Stephens* v. *Dudbridge Ironworks Co.* (1) and *Murray* v. *Schwachman, Ld.* (2); in both of which it was held that, where the claimant who had received compensation under the Act was not an adult but a minor, it was the duty of the Court to consider whether the acceptance of compensation under the Act was or was not for the benefit of the infant. If it was not for his benefit, then he would not be debarred from bringing a common law action by reason of s. 29. Nobody raised in those cases the possible argument which might have been raised as to what is to happen to the money that the infant has been paid and has received as compensation under the Act. It would be unfair for him to keep that money as well as get damages at common law. But what is the legal ground on which he can be made to give credit for it? Well, I am bound to say that I do not quite know what the answer to that point is. It is not necessary to investigate that further, because in this case, acting quite properly, the plaintiff is content to give credit against the damages assessed by the learned judge in the common law action for the amount previously paid by way of workmen's compensation.

I confess that I do feel some difficulty about the question how far the decisions in *Stephens* v. *Dudbridge Ironworks Co.* (1) and *Murray* v. *Schwachman, Ld.* (2) are precisely consistent, in all their implications and results, with the decisions in *Perkins* v. *Hugh Stevenson & Sons, Ld.* (3) and *Selwood* v. *Townley Coal and Fireclay Co.* (4), and what precisely is the line of conciliation, if conciliation be needed, between those two sets of authorities. But that does not arise in this case.

With the result proposed by the Master of the Rolls I agree.

DU PARCQ L.J. I also agree; and I have little to add. If I may say so, I share the difficulty which has been expressed by MacKinnon L.J. I may, perhaps, add that it is to be hoped that those cases of *Murray* v. *Schwachman, Ld.* (1) on the one hand and *Perkins* v. *Hugh Stevenson & Sons, Ld.* (2) on the other, may be considered some day by the House of Lords. I think I am right when I say that this Court was disposed to give leave to appeal to the House of Lords in the case of *Selwood* v. *Townley Coal and Fireclay Co.* (3), which has been referred to to-day; but there was, as it happened, an insuperable bar to giving such leave, because the parties had bound themselves by an agreement not to appeal beyond the Court of Appeal.

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(1) [1904] 2 K. B. 225.
(2) [1938] 1 K. B. 130.
(3) Ante p. 56.
(4) Ante p. 180.

There are only two other matters upon which I have anything to say, agreeing as I do with everything that has been said by the Master of the Rolls.

With regard to the question whether this acceptance of money as compensation under the Workmen's Compensation Act is shown to have been for the benefit of the workmen, I find it very difficult to see any answer to the point raised against Mr. Sellers that this money was accepted within a very short time, in fact a few days or a week or so, after the accident happened. Apart from everything else which has been said, it seems to me quite impossible to say that it was for the infant's benefit at that early stage to accept the money as compensation, so precluding herself from taking proceedings at common law. Any sagacious adviser, when asked to advise what course should be taken, even if he had not said at once, "Bring an action for damages at common "law," would, I think, certainly have said: "One may as well "wait and see what will happen about this injury till the "six months available under the Act have nearly expired."

The only other point about which I have reason to say a few words is whether this was a dangerous machine. Some part of Mr. Sellers' argument to-day was perhaps not unfamiliar to me, because it was a little reminiscent of what I heard from him in the case which has been referred to of *Walker* v. *Bletchley Flettons, Ld.* (4) In that case also

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(1) [1938] 1 K. B. 130.
(2) Ante p. 56
(3) Ante p. 180.
(4) [1937] 1 All E. R. 170.

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Mr. Sellers properly referred to the well known decision in *Hindle* v. *Birtwistle.* (1) I used a few words in that case of *Walker* v. *Bletchley Flettons, Ld.* (2), which have been cited, if I might respectfully say so, quite correctly by the learned judge. I think, however, that perhaps I was not quite wise to use the words which I did; because, although I think they were really accurate, apparently they were open to some misconception. I said with regard to *Hindle* v. *Birtwistle* (1), that, in considering whether machinery was dangerous, it was necessary to assume, as Wills J. had said, that the people who used it would sometimes be careless. I said I thought it was not inconsistent with what Wills J. had said in his judgment (3) to say "that "a part of machinery is dangerous if it is a possible cause "of injury to anybody acting in a way in which a human "being may be reasonably expected to act in circumstances "which may be reasonably expected to occur." The head-note proper in the All England Reports accurately sets out what I said; but there is an editorial note which purports to state the effect of my judgment and says this (4): "There "must, therefore, be some criterion of danger apart from the "mere happening of the accident, and it is stated that a part "of a machine is dangerous if it can be a possible cause of "injury to anyone acting reasonably." That is not only not what I said, but I think almost exactly the opposite of what I said. As I am afraid some people do not read the whole of a judgment—perhaps it is too much to expect that they should read the whole of my judgment—but are satisfied with the conclusions in the head-note, and, it may be, perhaps concentrate even more on the editorial note than the head-note, I thought it desirable to take this opportunity to correct that misapprehension on the part of the learned editor.

With regard to *Hindle* v. *Birtwistle* (1), I would only like to add that that case has been cited very, very many times, sometimes in my hearing, in the Divisional Court. Rather than use any words of my own, I should like to quote a few

(1) [1897] 1 Q. B. 192.
(2) [1937] 1 All E. R. 170.
(3) [1897] 1 Q. B. 192.
(4) [1937] 1 All E. R. 171.

lines from one of the many judgments in which the Lord Chief Justice has had to refer to that case. The case I am going to refer to, which is typical of many others, is *Sutherland* v. *Executors of James Mills, Ld.* (1) The Lord Chief Justice says (2): "The justices, apparently, followed the line of "reasoning which had been suggested—that they might regard "this machinery as not dangerous in fact, because, in view "of its history, persons might be reasonably led to think "that it was not dangerous. The section is dealing with "machinery which is dangerous in fact. I cannot help "observing that the particular passage in the case of *Hindle* "v. *Birtwistle* (3), the flying shuttle case, has once more been "adduced as having a relation to this case. The words of "the judge which are so often referred to are to be read, in "my opinion, with reference to the subject-matter of that "case. That case turned upon an accident that had been "caused by means of a flying shuttle—that is to say, by means "of a part of the machinery which was doing something "which it was never intended to do, and was not expected "to do. It is very difficult usefully to apply observations "made upon that case to cases where machinery is employed "for the very purpose for which it is intended to be employed, "and where the accident takes place by reason of the fact "that a workman—it may be carelessly, it may be hurriedly, "or it may be accidentally in the proper sense of the term— "brings a part of his body into contact with a dangerous part "of the machinery." I think those words may usefully be cited with the judgment in *Hindle* v. *Birtwistle* (3) whenever it is thought desirable to refer to that case.

I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Royds, Rawstorne & Co.; Carpenters.*

H. C. G.

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(1) [1938] 1 All E. R. 283.

(2) Ibid. 285.

(3) [1897] 1 Q. B. 192.

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COMPAGNIE PRIMERA DE NAVAGAZIONA PANAMA *v.* COMPANIA ARRENDATARIA DE MONOPOLIO DE PETROLEOS S.A.

Shipping—Charterparty—" Liberty to call "—Deviation—Contract for two voyages—Deviation on first voyage—Repudiation by charterers—Shipowners' right to damages.

A clause in a charterparty provided that the charterparty should remain in force " for two consecutive voyages at the same " rate of freight and upon the same terms and conditions " as therein provided :—

Held, by the Court of Appeal, that upon the true construction of the charterparty that there was one indivisible contract for the purposes of two voyages, and that, having regard to the whole circumstances, an unauthorized deviation of the ship on her first voyage freed the charterers from their obligation to fulfil their contract with the shipowners as to the second voyage if they elected to repudiate the contract. The case was remitted to the umpire to find on the facts whether the charterers had elected to repudiate the contract or to waive the shipowners' breach of contract.

Decision of Branson J. [1939] 2 K. B. 117 reversed.

APPEAL from a decision of Branson J. (1) upon a special case stated by an umpire.

By a charterparty dated December 30, 1937, the owners let to the charterers their steam tank vessel *Yolanda* to go to Istanbul and thence to Constantza in the Black Sea to load a cargo of oil and proceed to a Spanish port : and it was provided that the charter should remain in force " for two "consecutive voyages at the same rate and on the same "terms."

The material clauses of the charterparty, which were incorporated in the special case, were as follows :—

"1. That the said tank vessel being tight, staunch and "strong and every way fitted for the voyage, and to be "maintained in such condition during the voyage, perils of "the sea excepted, shall, as ordered on arrival at Istanbul "with all convenient dispatch sail and proceed to Constantza

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(1) [1939] 2 K. B. 117.

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"or a safe port in the Russian Black Sea . . . . and there load "from the factors of the said charterers a full and complete "cargo of gas oil and/or fuel oil and/or diesel oil and/or crude "oil in bulk . . . . and being so loaded shall therewith proceed "(as ordered on signing of bills of lading) direct to one port "Spanish Mediterranean Cartagena-Barcelona range both "inclusive . . . . and deliver the same on being paid freight "at the rate of 35*s*. per ton of oil intake quantity."

"9. . . . . The vessel has liberty to call at any ports in "any order . . . . and to deviate for the purpose of saving "life or property."

"12. The vessel to have leave to tow or be towed and "to assist vessels in all positions of distress or to call at any "port or ports for bunker supplies."

"22. Should vessel not be ready to load by January 25, "1938, charterers to have the option of cancelling this charter."

"26. Charterers undertake to establish irrevocable credit "for the freight on the first voyage under this charterparty "within five days of signing this charterparty."

"32. This charterparty is to remain in force for two "consecutive voyages at the same rate of freight and on the "same terms and conditions as herein provided . . . . the "irrevocable credit for the freight on the second voyage is "to be established before vessel sails from last discharging "port on her first voyage."

Disputes arose under the charter as to a claim by the shipowners for damages for losses and expenses incurred as a result of failure of the charterers to give orders for the second voyage mentioned in clause 32 of the charterparty (above). These disputes were referred to arbitration and the umpire now stated this special case raising questions of law for the opinion of the Court. The facts as found by the umpire and as stated in the special case were as follows:—

"The *Yolanda* duly loaded a cargo of oil at Constantza in "accordance with the charterparty and sailed from that port "on January 22, 1938, for Valencia. At the time of sailing "she had on board 58 tons of bunker coal, her total bunker "capacity being 876 tons. The vessel's normal consumption

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"is 35 tons a day, and the normal distance covered is about "150 miles a day.

"On leaving Constantza the captain intended to go to "Zonguldak for bunkers and set his course for that port. "Zonguldak is about 125 miles eastwards of the Bosporus and "is not a port on the ordinary route from Constantza through "the Bosporus. At a point between Constantza and "Zonguldak, the exact position of which is not proved, at "6.30 P.M. on January 23, 1938, the captain altered his course "to proceed to Istanbul because he considered that owing to "weather conditions bunkering at Zonguldak would not be "safe. The *Yolanda* arrived at Istanbul on January 24, 1938, "and took on 308 tons of bunker coal.

"The *Yolanda* sailed from Istanbul for Algiers, where she "had been ordered to take on board a non-intervention officer "before proceeding to Valencia to discharge. She proceeded "by the ordinary route towards Algiers, and between "January 25 and 31 met with weather which was no worse than "might have been reasonably expected for the time of year.

"On February 1 the *Yolanda* was off Bona, a North African "port some 240 miles east of Algiers, and she then had 75 to "80 tons of bunkers on board, which would have sufficed to "enable her to reach Algiers. On February 1 the *Yolanda* "called at Bona and took on board 220 tons of bunkers, and "having left that port she was on February 2 captured by "warships flying the Spanish Nationalist flag and was ordered "to proceed to Palma, where she arrived on February 3, and "where she subsequently discharged her cargo.

"The charterers were not aware of the course which had "been taken by the vessel in the Black Sea until a much later "stage in the proceedings. They were, however, aware on "or about February 3 that the vessel had called at Bona, "but they did not know until the arbitration the quantity of "bunkers on board on arriving off that port. On February 15 "the charterers' agents were informed that the *Yolanda* was "lying at Palma, and on February 28 they were informed "that the vessel had on the previous day left Palma and "would be arriving at Algiers the same afternoon. At the "same time the owners' agents asked the charterers to "give orders for the vessel's next loading port, it being "indicated that she had been forced to discharge her cargo at "Palma. On March 1 the charterers' agents were informed "that the *Yolanda* was proceeding from Algiers to Istanbul for "orders, in accordance with the charterparty. . . . . They "referred to deviations during the first voyage and reserved "their rights in respect thereof. Further correspondence "took place, and the charterers contended that the giving of "orders was not required until the vessel reached Istanbul. "On March 12 the owners' agents stated that the vessel "was nearing Istanbul and again asked for orders. On "March 14 the charterers' agents definitely declined to give "any orders for the second voyage. Thereupon the owners "chartered the vessel elsewhere and indicated that they would "claim damages from the charterers."

The case then stated that no sufficient evidence was placed before the umpire to establish the existence of a custom that vessels proceeding from Constantza via the Bosporus habitually bunkered at Zonguldak, and he accordingly found as a fact that when proceeding towards Zonguldak the *Yolanda* departed from her direct course according to the charterparty. He found also that at the time when she altered her course for Bona she had a sufficient quantity of bunkers on board to enable her to reach Algiers, and that in proceeding to Bona she had again departed without necessity from her direct course under the charterparty. He then found upon the evidence that the sum of 2200*l.* represented the amount of loss to the shipowners which was attributable to the alleged breach of the charterparty by non-performance of the second voyage. On these findings of fact he reserved the following questions for the decision of the Court and gave his award in accordance with the answers thereto :—

(*a*) Whether either or both of the said departures of the *Yolanda* from her direct course under the charterparty amounted in law to deviations.

(*b*) If the answer to (*a*) is in the affirmative, whether such deviation or deviations had the effect of relieving the

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charterers from further performance of the charterparty dated December 30, 1937, and in particular from the necessity of giving orders for a second voyage in accordance with clause 32 of the charterparty.

Branson J. held that the two voyages referred to in clause 32 of the charterparty were severable, and that, having regard to the whole circumstances, an unauthorized deviation of the ship on her first voyage did not free the charterers from their obligation to fulfil their contract with the shipowners as to the second voyage.

The charterers appealed. The appeal was heard on October 12, 13, 1939.

A. T. Miller K.C. and *John Forster* for the appellants. Branson J. was wrong in holding that the deviation to Zonguldak avoided the charterparty only as to the first voyage and not as to the second voyage also. The deviation to Zonguldak avoided the charterparty not merely as to the first voyage, but in its entirety. The subsequent call at Bona was also a deviation and that deviation together with the deviation to Zonguldak constituted so serious an amount of deviation as to avoid the charterparty entirely. The two voyages are related to each other in such a way that a deviation in the earlier voyage must affect the circumstances of the second voyage. If there was deviation the facts found in the special case do not show any waiver by the appellants of their right to claim rescission of the contract by reason of that deviation. The charterers had arranged for credit for the freight at certain ports at a certain time, and they might fail to get the credit if the ship arrived at the ports late. The charterers have the option of sending the ship to a port for the discharge of cargo without interference. The two contract voyages are not separate voyages or separable from each other but hang together as a unity. If the vessel departed from her course during the first voyage, the whole future course of the contract voyages is changed. She would arrive at all the subsequent ports at a later date than she would have done if she had not deviated from her course. The two voyages under the charterparty besides being immediately consecutive voyages under the same charterparty, are so interlocked that the due performance of the second voyage is dependent upon the due performance of the first voyage. This contract is entirely different from a contract for the delivery of goods by instalments under which the instalments are separate, and failure to deliver one instalment does not necessarily invalidate the contract as to the remaining instalments. Here there was one contract for two voyages, and a failure in the due performance of the first voyage amounts to a repudiation of the whole contract. A deviation such as this during the first voyage delays the transaction of all the remaining business. The charterers might not only be prevented from obtaining their credit for freight at the end of the first voyage, but might also be prevented from arranging credit for the second voyage. The charterers' arrangements for the second voyage were dependent upon the due performance of the first voyage. If a ship does not duly arrive at her port of destination at the end of the first voyage, the charterers are entitled to cancel the contract. The judge was wrong in treating the second voyage as if it were the subject-matter of a separate contract. In *Maple Flock Co.* v. *Universal Furniture Products* (*Wembley*), *Ld.* (1), the contract was for the sale of goods to be delivered by instalments. The principles applicable to such a contract do not apply to a contract such as this. In *Hain Steamship Co.* v. *Tate & Lyle, Ld.* (2), Lord Atkin said (3): "I venture to "think that the true view is that the departure from the "voyage contracted to be made is a breach by the shipowner "of his contract, a breach of such a serious character that, "however slight the deviation, the other party to the contract "is entitled to treat it as going to the root of the contract, and "to declare himself as no longer bound by any of the contract "terms"; and Lord Wright (4) expressed a similar opinion. This is one contract for two voyages and by the deviation during the first voyage it has been determined. The visit to the port of Bona was a second deviation. Under their

(1) [1934] 1 K. B. 148.
(2) (1936) 41 Com. Cas. 350.
(3) 41 Com. Cas. 354.
(4) Ibid. 362.

charter the charterers have liberty to call at any port for bunker supplies. That liberty, however, is limited to ports "in the course of a voyage": *Leduc & Co.* v. *Ward.* (1) The port of Bona is not a coaling port, and was not in the course of the voyage.

Sir Robert Aske K.C. and *R. P. Colinvaux* (for *A. A. Mocatta* serving with His Majesty's forces) for the respondents. If the contention put forward by the appellants is correct it would mean a considerable extension of the doctrine of deviation. The going out of her course by a ship for a few miles is not such a deviation as to vitiate the contract of charter. It is laid down in the Hague Rules, 1921, that a reasonable deviation shall not be deemed to be an infringement or breach of the contract of carriage.

[MACKINNON L.J. The rule as to deviation in the Hague Rules is utterly unintelligible.]

The deviation affects the carrying voyage and the chartered voyage, which is not the carrying voyage, in an entirely different way. The chartered voyage is the voyage which the shipowners undertook to load, and is different from the carrying voyage. The doctrine of deviation has full effect as regards the carrying voyage, but not as regards the rest of the chartered voyage which only gives the charterers a right to sue for damages and not to cancel the charterparty, unless the deviation entirely defeats the purpose for which the chartered voyage was made. The two voyages provided for by the charterparty were not so interdependent as to make a deviation on the first voyage affect the purpose of the second voyage in such a way as to destroy it. The reason why deviation is held to have such an effect on the voyage is by reason of its effect on the insurance of cargo. If a charterparty provides for a second voyage, and owing to a deviation on the first voyage there is a delay in the ship proceeding to the loading port on the second voyage, the deviation on the first voyage will have no disruptive effect on the contract for the second voyage unless the effect of the deviation is so great as to defeat the commercial purpose of the second voyage, it will merely give a right to claim damages. The law is thus stated in Scrutton on Charterparties, 14th ed., art. 28: "In all "contracts for the carriage of goods by sea, there are implied, "in the absence of express stipulations to the contrary, the "following undertakings by the shipowner or carrier: (1.) "That his ship is seaworthy. (2.) That his ship shall commence "and carry out the voyage contracted for with reasonable "diligence. (3.) That his ship shall carry out the voyage "contracted for without unnecessary deviation. Such breaches "of these undertakings as defeat the commercial purpose of "the voyage will justify the hirer of the ship or the owner of "the goods carried in repudiating the contract to carry. Such "breaches as do not defeat the commercial purpose of the "voyage will give rise to an action for damages." The principle was expanded in art. 30, as follows: "The ship-"owner impliedly undertakes that his vessel shall be ready to "commence the voyage agreed on and to load the cargo to be "carried, and shall proceed upon and complete the voyage "agreed upon, with all reasonable despatch. If by a breach "of this undertaking there is such delay as 'goes to the root of "'the whole matter, deprives the charterer of the whole benefit "'of the contract, or entirely frustrates the object of the "'charterer in chartering the ship,' the charterer may refuse to "perform his part of the contract altogether. If the delay "is not so serious as to have this result, the charterer cannot "refuse to load, but the shipowner will be liable for damages, "unless the delay was caused by an excepted peril." *MacAndrew* v. *Chapple* (1) and *Freeman* v. *Taylor* (2) are cited as authorities for those propositions. Those authorities bear out the shipowner's contentions.

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(1) (1888) 20 Q. B. D. 475.

[Slesser L.J. It all comes back to a construction of this contract and no question as to the general law arises. There is a finding that there was a deviation which gave the charterers a right to repudiate the contract as regards the first voyage. The question is whether this was a contract for two separate voyages or whether it was one adventure.]

The contract which the parties entered into was one for two voyages. If there was a deviation the charterers have the right to elect to accept that deviation and to waive their right to repudiate the contract. The case must go back to the umpire to decide whether the charterers have elected to waive the right to repudiate.

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(1) (1866) L. R. 1 C. P. 643. (2) (1831) 8 Bing. 124.

SLESSER L.J. The arbitrator has found as a fact in this case that, as regards the first voyage which the charterparty contemplates, there has been at least one perhaps two deviations from that contract voyage which would justify the charterers in repudiating the contract. The first was that the ship, instead of proceeding directly from the port of loading to the contemplated port, deviated, for the purpose of bunkering, to a port called Zonguldak instead of going directly to Istanbul. The second deviation was to a port called Bona at a time when it was, in the view of the arbitrator, not necessary to deviate there for the purpose of bunkering.

It is conceded that, if the charterparty was one for this one voyage only, there was found such deviation as would enable the charterers to repudiate the whole of the contract: see *Hain Steamship Co.* v. *Tate & Lyle, Ld.* (1)

The difficulty, however, arises, because the charterparty contemplates a second voyage. After providing that the vessel " shall, as ordered on arrival at Istanbul, with all "convenient despatch, sail and proceed to Constantza or a "safe port in the Russian Black Sea," and then proceed, as may be directed, " to one port Spanish Mediterranean "Cartagena-Barcelona range, both inclusive," there is added by clause 32: " This charterparty is to remain in force for "two consecutive voyages at the same rate of freight and on "the same terms and conditions as herein provided." That is to be read in this way, that, the first voyage being completed, the ship must again arrive at Istanbul and, as ordered, proceed to Constantza or a safe port in the Russian Black Sea, and go as directed " to one port Spanish Mediterranean "Cartagena-Barcelona range, both inclusive."

Sir Robert Aske contends that the mere fact that there has been a deviation on the first voyage does not enable the charterers to do what they purported to do—namely, to repudiate the whole contract, but that the obligation with regard to the second voyage still stands though it may be that damages are obtainable for the wrong done by the deviation on the first voyage. He is really seeking to import into the contract the principle which is so familiar in the cases of contracts for the sale of goods by instalments, such as *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1)

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(1) 41 Com. Cas. 350.

The question, in my opinion, depends entirely on the construction of the particular charterparty into which these charterers and owners have entered, which indicates what was in the contemplation of the parties and what they had agreed to do. In my view, this was one indivisible contract for the purposes of the two voyages.

I come to that conclusion for several reasons. First, there is, to my mind, no indication that the contract is to be regarded as anything but one contract, for the purpose of one voyage in a certain prescribed way followed immediately by what is aptly described as a consecutive voyage. Clause 22, which deals with the loading date, provides: "Should vessel not be ready to load by January 25, "1938, charterers to have the option of cancelling this "charter"—not "this voyage," but "this charter." So far, it is clear that if the vessel were not in the port on January 25 both voyages could have been cancelled. It is to be noted that there is no loading date stated with regard to the second voyage. The second voyage was to be on the same terms as the first, but clause 22 cannot apply to the second voyage, because that clause is dealing with the date of January 25, which can only be applicable to the first voyage. All that can be said with regard to the second voyage is that, at the end of the first voyage, there is an obligation, within a reasonable time, to be at Istanbul to receive the directions, which are to be given under clause 1 in the case of both voyages, where the ship is to proceed to and receive directions as to the final destination.

Another reason why I come to the conclusion that this

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(1) (1884) 9 App. Cas. 434.

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contract is indivisible is this. It is provided in clause 32 that "the irrevocable credit for the freight on the second "voyage is to be established before vessel sails from last "discharging port on her first voyage." Clause 26, which deals with irrevocable credit, says: "Charterers undertake "to establish irrevocable credit for the freight on the first "voyage under this charterparty within five days of signing "this charterparty." That, of course, cannot be applicable to the second voyage, and, in substitution therefor, the date for providing the irrevocable credit of the second voyage is to be before the ship sails from last discharging port on her first voyage. This indicates, to my mind, that this contract is one, and contemplates the second voyage as beginning on the termination of the first voyage, some of the obligations on the second voyage being dependent on the obligations of the first voyage being discharged.

Another consideration which occurs to my mind is this. It is provided that the freight shall be at the same rate on the second voyage as on the first voyage. I think it may be reasonably assumed that, in coming to that arrangement the parties had in mind that the first voyage was going to be performed and that if the first voyage was not performed the whole market conditions might change. The freight seems to be fixed on the assumption that the whole of this contract is going to be carried out.

For these reasons I find myself regretfully differing from the learned judge, who took the view that there was nothing in this deviation which prevented the obligations arising under the second voyage.

If that be so there is raised in this case another question. It is said that even if this contract might have been repudiated as a whole, by the deviation, there was in fact here a waiver of the right to repudiate. That question depends largely on an exact finding as to the knowledge of the charterers at the time when they refused to perform the contract. The learned judge has come to the conclusion that there is not, in the special case, sufficient material on which to come to a conclusion whether that

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waiver does or does not exist. He puts it in this way: "If it "were necessary to do so, it would be proper to request the "umpire to assist the Court by finding as a fact whether "there had been a waiver or not." It is contended on the one hand that, upon the true construction of the language used in the special case, the umpire has found that there was no waiver, because he has found that the knowledge in the charterers, which they must have had before they could be held to have waived a breach of the contract, was not in their possession until a late stage in the arbitration proceedings. It is contended, on the other hand, that the proper construction of the special case does not lead to any such result. In my view the clause in the special case which is material upon this point is ambiguous. It reads as follows: "The charterers were not aware of the course which had been "taken by the vessel in the Black Sea until a much later "stage in the proceedings. The charterers were, however, "aware on or about February 3, 1938, that the vessel had "called at Bona." Now, as a matter of construction, if one had to give a concluded opinion about it, it would appear to me that the meaning of that clause is that the charterers were not aware of the course which the vessel had taken in the Black Sea until some time after the course had been taken, because of the expression "until a much later stage "in the proceedings." No other stage in the proceedings, if "the proceedings" mean arbitration, had been referred to at all by the umpire, and I think it must have meant that they did not know until some time after the event had happened. Now, that is not sufficient to enable this Court to come to an opinion as to whether there had been a waiver or not and, if waiver were material, I should have felt obliged to remit the case to the arbitrator for a finding of the necessary facts, to wit, the fact as to the date when the knowledge that the ship had shaped her course for Zonguldak had come to the charterers.

In my opinion the learned judge was right in saying that, on the view that this contract was repudiated, the matter ought to be referred back to the umpire for the reasons which

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he states, and I think, therefore, that the matter should be referred back in accordance with the learned judge's opinion.

MacKinnon L.J. I agree. There was apparently considerable discussion before Branson J. whether putting into the port of Bona was a deviation, or whether it was permitted by the terms of the charterparty. I think it is quite unnecessary to go into that. There is no doubt that on the voyage from Constantza towards Istanbul there was a deviation, as has been found by the arbitrator. In the lamentably obscure statement of the facts I am able to gather that the charterers knew of this deviation at a later date than when they knew about putting into Bona. If that was so, whether putting into Bona was a second deviation is quite immaterial, because there was undoubtedly a deviation by going off to Zonguldak. For that reason I express no opinion on the question whether there was a second deviation by putting into Bona.

The contract between these parties contains this provision: "Should vessel not be ready to load by January 25, 1938, "charterers to have the option of cancelling this charter." Those words are incapable of any doubt. If the vessel did not arrive at Constantza and be ready to load by January 25, the charterers could cancel both voyages and cancel the whole contract.

In addition to that express provision, there is also an implied term in this charterparty, as in all charterparties, that the shipowner shall prosecute the voyage or voyages without deviation. The nature of that implied term has often been stated in the Courts, and nowhere more clearly, or with more emphasis, than in the comparatively recent case of *Hain Steamship Co.* v. *Tate & Lyle, Ld.*, where Lord Atkin said (1): "I venture to think that the true view is that the departure "from the voyage contracted to be made is a breach by the "shipowner of his contract, a breach of such a serious character "that, however slight the deviation, the other party to the "contract is entitled to treat it as going to the root of the

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(1) 41 Com. Cas. 350, 354.

"contract, and to declare himself as no longer bound by any "of the contract terms." Similar language was used by Lord Wright. The effect of deviation, which is the breach of that implied term in the contract, is accurately stated in Scrutton on Charterparties, 14th ed., p. 310: "An owner whose ship "deviates in the sense defined above thereby commits a "fundamental breach of his contract of carriage. The other "party to such contract, on becoming aware of the deviation, "can either treat the breach as a repudiation bringing the "contract to an end, or elect to waive the deviation as a "final repudiation and treat the contract as still subsisting, "reserving his right to damages." In other words, if the implied term was written out in the contract, as the cancelling clause 22 is, it would be something to this effect: The shipper shall proceed on the agreed voyage or voyages without deviation, except to save life or avoid danger to ship or cargo; if the shipowner breaks this undertaking the charterer, on knowing of it, may cancel this charterparty.

In this case, it is said that the charterers, on becoming aware of the deviation, did treat the breach as a repudiation which brought the contract to an end, and that if they brought the contract to an end they brought the whole contract to an end just as effectively as they would have done if they had exercised their option under clause 22 on the vessel's arriving at Constantza on January 26 or 27. That, in my view, is the legal position as regards this matter. a view of the law on which I differ from Branson J.

As I have pointed out—to re-read from Scrutton on Charterparties—" The other party to such contract "—that is the charterer—" on becoming aware of the deviation, can either "treat the breach as a repudiation bringing the contract to an "end, or elect to waive the deviation as a final repudiation and "treat the contract as still subsisting." The statement of facts in the special case is unfortunately so obscure that it is quite impossible, as Branson J. said, to be satisfied which of those alternatives is the true inference to be drawn from what the parties agreed in this case.

I think that the case must, therefore, as Branson J. thought,

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go back to the arbitrator to reconsider the facts and state them properly and clearly for the information of the Court. When he has done that, the case should go back to Branson J., or the judge taking the Commercial List, who will then deal with the special case, as so supplemented by the further findings of the arbitrator, in the light of the law as we have laid it down.

DU PARCQ L.J. I agree, and I do not think I can usefully add anything.

Solicitors for appellants: *Middleton, Lewis and Clarke.*
Solicitors for respondents: *Holman, Fenwick and Willan.*

R. F. S.

NEWSTEAD *v.* LONDON EXPRESS NEWSPAPER, LIMITED.

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Nov. 2, 3, 6, 7, 20.

Defamation—Libel—No intention to defame plaintiff—Words true of another existing person—Questions left to jury—Whether words could be reasonably understood to refer to plaintiff—Disagreement of jury—Plaintiff awarded one farthing damages—Effect of jury's findings.

A newspaper published an account of a trial for bigamy and referred to the prisoner as "Harold Newstead, thirty-year-old "Camberwell man." The account was true as regards a Camberwell barman of that name, but was not true as regards the plaintiff, Harold Newstead, aged about thirty, who assisted his father in a hairdressing business at Camberwell Road, Camberwell. The plaintiff brought an action for libel against the proprietors of the newspaper. Five questions were left to the jury, who were unable to agree on the first question: "Would reasonable persons "understand the words complained of to refer to the plaintiff?" and they assessed the plaintiff damages at one farthing. No judgment was entered and the parties were left to make up their minds as to the future course of the litigation:—

Held (affirming the decision of Hawke J. [1939] 2 K. B. 317), (1.) that the evidence would have justified a finding by the jury that reasonable persons would have understood the words complained of to refer to the plaintiff; and (2.) that, assuming the words complained of were capable of a meaning defamatory of the plaintiff, the fact that they were true of another person did not afford a good defence to the defendants.

Per MacKinnon L.J. That as the jury assessed the damages at one farthing and no reasonable jury could be expected to assess them at a higher figure, the Court ought not to permit or direct a further trial of the action.

APPEAL from Hawke J. (1)

Argument on points of law arising out of the findings of a jury in an action for libel.

The plaintiff was one Harold Cecil Newstead, a hairdresser, who assisted his father in business at Camberwell Road, Camberwell.

The defendants were the printers and publishers of the Daily Express newspaper.

The words complained of were published in the Daily Express of March 30, 1938, under the title "Why do people

(1) [1939] 2 K. B. 317.

"commit bigamy ?" and were as follows : "Harold Newstead, "30-year-old Camberwell man, who was jailed for nine months, "liked having two wives at once. Married legally for a second "time in 1932—his legal wife is pictured right, above—he "unlawfully married nineteen-year-old Doris Skelly (left, above). "He said 'I kept them both till the police interfered.'"

The case for the plaintiff was that he was well known in the hairdressing trade in Camberwell and elsewhere as Harold Newstead, and that he was about thirty years of age, and a Camberwell man. He alleged that the words published were understood by a number of people to refer to him, and to mean that he had committed bigamy and been punished therefor.

The defendants admitted publication, but denied that the words complained of were intended or understood to refer to the plaintiff, or that they were defamatory of him. They asserted that the words were published of an existing person of the name and description therein contained, and were intended, and were understood, to refer to that person, who was not the plaintiff. In relation to that other person, they said, the words published were true, and they pleaded justification and fair comment.

The plaintiff, in his reply, submitted that, if the words were intended to refer to some other person, it was the absolute duty of the defendants, or at least their duty, to take reasonable care to give a precise and detailed description of such person, denoting him exclusively, and to ensure that the words published should not be capable of referring to any other person. In breach of such duty they had recklessly struck out words giving the occupation and address of the person convicted.

His Lordship left the following questions to the jury :—

1. Would reasonable persons understand the words complained of to refer to the plaintiff ?

2. (*a*) Was it true to say that the convicted man was "a "Camberwell man" ?

(*b*) Was it true to say that the convicted man "liked having "two wives at once" ?

3. Was the expression "liked having two wives at once" a fair comment on the conduct of the convicted man?

4. In omitting the occupation and address of the convicted man were the defendants

   (*a*) reckless?

   (*b*) negligent?

5. Damages (if any).

The jury returned answers to the last four questions, but were unable to agree on the first question, and they assessed damages at one farthing, and were discharged. The answers of the jury were not read out in Court, but the paper on which they were written was handed down to counsel.

The question what effect should be given to the findings of the jury was adjourned for further consideration. Having heard arguments, his Lordship held (1.) that the principle in *Jones* v. *E. Hulton & Co.* (1) applied, and the fact that the words complained of were intended to refer to, and were true of an existing person, who was not the plaintiff, did not afford a defence to the action; (2.) that an answer to the question whether reasonable persons would understand the words to refer to the plaintiff was essential to the success of the plaintiff in the action; and (3.) that therefore no judgment would be entered, and the parties must be left to make up their minds as to the future course of the litigation.

The defendants appealed. The appeal was heard on November 2, 3, 6, 7, 1939.

G. O. Slade for the appellants. The appellants' claim that they were entitled to a judgment in their favour on the jury's answers to questions two and three. Question one did not matter, question four was immaterial. The words complained of were not reasonably capable of applying to the respondent, and the jury ought to have so directed.

Farwell L.J. in *Jones* v. *E. Hulton & Co.* (2) deals with recklessness and refers to *Derry* v. *Peek.* (3)

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(1) [1909] 2 K. B. 444; [1910] A. C. 20.

(2) [1909] 2 K. B. 444, 480.

(3) (1889) 14 App. Cas. 337.

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[SIR WILFRID GREENE M.R. Recklessness must depend upon the facts in each case.]

The averment that the libel was written of and concerning the plaintiff is a material averment, and unless sensible people reading the libel could see that it referred to the plaintiff it would not be a libel—see Lord Alverstone C.J. in *Jones* v. *E. Hulton & Co.* (1) A libel consists in using language which others knowing the circumstances would reasonably think to be defamatory of the plaintiff, and he must be injured by it; Lord Loreburn L.C. in *E. Hulton & Co.* v. *Jones.* (2) In *D. C. Thomson & Co.* v. *McNulty* (3) Lord Dunedin followed *E. Hulton & Co.* v. *Jones* (2) and in *Shaw* v. *London Express Newspaper, Ld.* (4), the case was withdrawn from the jury, because the article in question could not refer to the plaintiff and was therefore not defamatory. *Cassidy* v. *Daily Mirror Newspapers* (5) was a very different case from the present one. The de facto intention of the writer does not affect the issue. Where words are published which are true of an existing person no action will lie at the suit of another person, even if that person satisfies the jury that reasonable people might think the words apply to him. In the absence of recklessness a person is not liable to pay damages for a publication that is true of one person, even if all the friends of another person think that the cap fits him.

No one can reasonably assume that the plaintiff is meant, unless there is something in the article or the surrounding circumstances that particularly points to the plaintiff, and the plaintiff must plead and prove the circumstances: *Bruce* v. *Odhams Press, Ld.* (6) There is nothing in the article or the surrounding circumstances in this case that particularly points to the plaintiff.

The question whether something written about a particular person is capable of applying to another particular person is one for the judge and not the jury. When the only things that emerge from the evidence in dealing with a true statement

(1) [1909] 2 K. B. 444, 452–3.
(2) [1910] A. C. 20, 23.
(3) (1927) 71 Sol. J. 744.
(4) (1925) 41 Times L. R. 475.
(5) [1929] 2 K. B. 331.
(6) [1936] 1 K. B. 697.

about some one other than the plaintiff are that the plaintiff has the same name, comes from the same district and is about the same age, it is impossible to infer the intention to refer to the plaintiff. The intention to be found is not one of de facto intention but of assumed intention. The matters that arise here are (1.) whether the statement was true of some one other than the plaintiff and of this there is no doubt. (2.) If the statement is true of that person, has the plaintiff shown that a defamatory statement has been published of him and, as already suggested, for this purpose an assumed intention must be shown in the clear evidence of no de facto intention. (3.) Assumed intention is manifested in two ways (*a*) by the defamatory words themselves, or (*b*) by the circumstances and manner of publication. An example of (*b*) is when words are published about A and the publisher must be assumed to know that in view of the outstanding position of B a large number of persons would regard them as applying to B. Recklessness arises when the assumed intention differs from the de facto intention by reason of the conduct of the writer of the libel. It is a species of estoppel by conduct. The only province of the factor for recklessness in cases of this type is when the writer of an alleged libel says he never meant it in his own mind, although it is apparent that everyone must understand otherwise. It is only where in the words used is a true statement about someone else there is something which points particularly to the plaintiff that the time comes to go to the jury. Here there is nothing of the kind. The statement made here was capable of verification by anyone interested and no reasonable person would jump to the conclusion that it referred to his friend the plaintiff. The same sort of question arises as when the question is whether the words used are capable of a defamatory meaning and the question is not what the writer meant, but what meaning the words used might reasonably bear: see *Perryman* v. *Lister*. (1) Here there was not the necessary foundation to enable the question to be put to the jury of who was the person to whom the published statement might be understood to refer to. It

(1) (1868) L. R. 3 Ex. 197, 200.

would be different if there was something in the surrounding circumstances to point to the plaintiff, as if a man with the relevant poster had been placed opposite his shop. If the statement in truth referred to an insignificant person and might be taken to refer to a well known person, the learned judge would take that into account in considering whether there was a case to leave to the jury. Here the plaintiff had a second Christian name, was unmarried, and was not of the age mentioned in the statement. It is unreasonable to jump to the conclusion that he was referred to, and the judge ought to have dismissed the action.

The appellants here are entitled to judgment on two grounds (1.) that there was no case to go to the jury and (2.) that judgment could be given on the questions answered by the jury.

[SIR WILFRID GREENE M.R. The jury was discharged because they could not agree and therefore there is no verdict.]

The jury disagreed on the first question of whether the alleged libel referred to the plaintiff, but the judge had found that the statement was privileged and the jury found that there was no malice, so that on that finding alone the appellant was entitled to judgment and the absence of an answer to the first question was immaterial. Alternatively the appellant asked for a new trial and in that case asked that the finding of a farthing damage should stand. It is submitted that the Court has power so to direct: see Order XXXIX., rr. 6, 7.

A. T. Denning K.C. and *R. M. Wilson* for the respondent. The facts here are that in the report of the proceedings for bigamy at the Central Criminal Court, the Harold Newstead the convict was referred to as having the occupation of a barman and his address in Camberwell given. After the report reached the newspaper office the assistant editor wrote the matter up into a story and in doing so omitted the address and referred to the man as a Camberwell barman. At a later stage someone altered that account once more by altering "barman" into "man." It is the omission of these identifying things that have given rise to this action and the defendants' sub-editor agreed that it is important to identify the person referred to as nearly as possible. In other papers the occupation and address were inserted. It is these omissions that have made the words capable of referring to the plaintiff and therefore it is a question for the jury whether the words could reasonably be taken to refer to the plaintiff and the learned judge so held. It is for the papers to make fair and accurate reports and it is only if they do this that the newspaper can claim exemption on the ground of privilege in a case where the report can be taken to apply to a different person. It is a good defence if the defendants can show that the possible mistake arose through no lack of reasonable care and this the defendants cannot do in the present case. Again there is no such thing as legal or assumed intention any more than there is legal fraud. This point of the appellants' argument would lead to a man who published a libel with the intent of injuring A escaping liability where there was another man of the same name of whom it was true.

Next, there is no such thing as absolute truth. It is necessary first to ascertain the meaning of the words used and then see whether they are true and the meaning must be ascertained independently of the writer's intention. The words used here were clearly defamatory and no regard can be paid to the intention in publishing them. They are published at the publisher's peril unless he has some reasonable excuse for doing so. This is made clear by *Jones* v. *E. Hulton & Co.* (1) The judge is clearly right here in holding that the words in question were capable of being defamatory of the plaintiff and that being so the case must clearly go to the jury.

[MACKINNON L.J. referred to *Cooper and Wife* v. *Proprietors of the Oldham Chronicle.* (2)]

It is well established by *Hulton's* case (1) that the Court did not look to the intention with which words were published: see Spencer Bower on the Law of Actionable Defamation (1st ed.), p. 12. In *Cassidy's* case (3) it was pointed out that if published words were reasonably capable of referring to A the publisher must take the consequences: see *Youssoupoff* v.

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(1) [1909] 2 K. B. 444; [1910] A. C. 20.

(2) Unreported.

(3) [1929] 2 K. B. 331, 341.

Metro-Goldwyn-Mayer Pictures, Ld. (1), and Gatley on Libel (2nd ed.), pp. 125, 126. Here the appellants cannot rely on their defence as reasonable excuse. They ought to have known that by omitting the name and occupation of the person they were referring to they made it possible that what they said might be taken to apply to another person: see Pollock on Torts (14th ed.), p. 200. The element of negligence is only material in considering whether there is reasonable excuse for what has been done: see Salmond on Torts (9th ed.), p. 403. American cases dealing with this branch of the law are *Hausa* (or *Hauson*) v. *Globe Newspaper Co.* (2); *Peck* v. *Tribune Co.* (3) and *Washington Post* v. *Kennedy* (4) and an Australian authority is *Lee* v. *Wilson*. (5) In *Washington Post* v. *Kennedy* (4) the very point that arises here of omitting a description that would have distinguished that person to whom reference was intended to be made for someone else.

It is not what was the intention of the writer of the article that matters, but what was the tendency of the article: *Capital and Counties Bank* v. *Henty*. (6) It is now established that what matters is not what the writer of an article means, but what the article means to its readers. An article which is prima facie innocent may became capable of a defamatory meaning by reason of the circumstances surrounding its publication, and it is for the judge to determine whether what is complained of is capable of a defamatory meaning: Lord Tomlin in *Tolley* v. *J. S. Fry & Sons, Ld.* (7)

When considering whether a publication is reasonably capable of a defamatory meaning the fact that it is true of another person does not matter.

[DU PARCQ L.J. In Fraser on Libel and Slander (7th ed.), pp. 14–15, there is a long list of cases in which judges have differed as to what is reasonably capable of a defamatory meaning.]

It cannot be an excuse that what has been published

(1) (1934) 50 Times L. R. 581.

(2) (1893) 159 Mass. Rep. 293.

(3) (1909) 214 U. S. 185.

(4) (1925) 3 Fed. Rep., 2nd series, 207.

(5) (1934) 51 C. L. R. 276.

(6) (1882) 7 App. Cas. 741, 781–2.

(7) [1931] A. C. 333, 350.

is true of another person. There is a consensus of opinion that carelessness is no defence to an action for libel.

G. O. Slade replied.

1939. Nov. 20. SIR WILFRID GREENE M.R. I have read the judgment about to be delivered by du Parcq L.J. Agreeing as I do with his conclusions, and the reasons which he gives for them, I do not think it necessary to deal at length with the case. But I wish to offer some observations of my own upon one crucial matter, which was much discussed before us.

Great reliance was placed by Mr. Slade upon the language used by Farwell L.J. in his judgment in the case of *Jones* v. *E. Hulton & Co.* (1) It is not surprising that he should have done so, in view of the fact that when that case reached the House of Lords, two out of the four noble and learned Lords who heard the appeal (Lords Atkinson and Gorell) expressed their " substantial concurrence " with that judgment. At the same time, Lords Atkinson and Gorell expressed their concurrence with the opinion of Lord Loreburn L.C., whose reasoning I find it impossible to reconcile with much of what was said by Farwell L.J. In these circumstances, I am constrained to regard the reasoning of Lord Loreburn L.C. as representing the real ratio decidendi of the majority of the House, and the opinion of the other noble and learned Lord, Lord Shaw, does not differ from it in any important particular. It is to be observed that the opinions of the members of the House were not on that occasion considered opinions : if they had been, the language of Lords Atkinson and Gorell in relation to the judgment of Farwell L.J. would no doubt have been more explicit. I think it right to state my views upon this matter, as the expressions in question have given rise to much doubt and controversy.

There are two passages in the judgment of Farwell L.J. upon which Mr. Slade strongly relied. The learned Lord Justice says (2): "But it is not enough for a plaintiff in libel "to shew that the defendant has made a libellous statement, "and that the plaintiff's friends and acquaintances understand

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(1) [1909] 2 K. B. 444.

(2) Ibid. 480.

"it to be written of him: he must also shew that the defendant "printed and published it of him; for if the defendant can "prove that it was written truly of another person the plaintiff "would fail." Again, the Lord Justice says (1): "If the "libel was true of another person and honestly aimed at and "intended for him, and not for the plaintiff, the latter has no "cause of action, although all his friends and acquaintances "may fit the cap on him." Now it is important to examine carefully the process of reasoning of which these passages form part. In the first passage Farwell L.J. expresses his agreement with the view which had been expressed by Fletcher Moulton L.J., as to the necessity of the presence of an intention on the part of the defendant to refer to the plaintiff. That view is summarized by Fletcher Moulton L.J. where he says (2): "It is therefore, to my mind, settled "law that a defendant is not guilty of libel unless he wrote "and published the defamatory words 'of and concerning "'the plaintiff'—in other words, unless he intended them to "refer to the plaintiff." Farwell L.J. then says that the point of difference between himself and Fletcher Moulton L.J. lies in the meaning of the word "intended" and states (correctly, if I may respectfully say so) that "the inquiry is "not what did the defendant mean in his own breast, but what "did the words mean having regard to the relevant surrounding "circumstances." Later on he says: "So the intention to "libel the plaintiff may be proved not only when the defendant "knows and intends to injure the individuals, but also when "he has made a statement concerning a man by a description "by which the plaintiff is recognized by his associates, if the "description is made recklessly, careless whether it hold up "the plaintiff to contempt and ridicule or not" and (3) "the element of intention, which is as essential to an action "of defamation as to an action of deceit, can be proved in the "same way in both actions." He had previously referred to the fact that fraud is committed where a representation is made (4) "recklessly, careless whether it be true or false, and

(1) [1909] 2 K. B. 444, 481.
(2) Ibid. 464.
(3) Ibid. 481.
(4) Ibid. 480.

"although there was no intention to cheat or injure the "person to whom the statement was made—*Derry* v. *Peek* (1)— "and yet the fraudulent intent is of the essence of the action." It would be affectation to say that in criticizing the reasoning of so learned a judge I speak with hesitation, since my view upon the matter is clear. It appears to me that the analogy of the action of deceit is not a true analogy. In that action the necessity for the presence of a fraudulent intention is satisfied if it be shown that the defendant made the statement in question recklessly, careless whether it were true or false. But this recklessness and this carelessness have nothing to do with the meaning of the statement—they are relevant only to the question of the fraudulent intent of the person making it. But in applying the analogy to the case of libel, Farwell L.J. applies the test of recklessness to the meaning of the words used, which is quite a different matter. If the words used when read in the light of the relevant circumstances are understood by reasonable persons to refer to the plaintiff, refer to him they do for all relevant purposes. Their meaning cannot be affected by the recklessness or honesty of the writer.

I do not propose to refer to the authorities which establish this proposition, except to quote the words of Lord Loreburn L.C. in *E. Hulton & Co.* v. *Jones*, where he said (2): "What does the tort consist in? It consists in using language "which others knowing the circumstances would reasonably "think to be defamatory of the person complaining of and "injured by it." In the case of libel, once it is held that the words are capable of referring to the plaintiff, it is, of course, for the jury to say whether or not they do so refer. Subject to this, the principle is in truth an illustration of the rule that the author of a written document is to be taken as having intended his words to have the meaning which they convey when understood in the light of the relevant surrounding circumstances. In the case of libel, the same words may reasonably convey different meanings to a number of different persons or groups of persons, and so be held to be defamatory of more persons than one.

(1) 14 App. Cas. 337, 374. (2) [1910] A. C. 20, 23.

After giving careful consideration to the matter, I am unable to hold that the fact that defamatory words are true of A, makes it as a matter of law impossible for them to be defamatory of B, which was in substance the main argument on behalf of the appellants. At first sight this looks as though it would lead to great hardship. But the hardships are in practice not so serious as might appear, at any rate in the case of statements which are ex facie defamatory. Persons who make statements of this character may not unreasonably be expected, when describing the person of whom they are made, to identify that person so closely as to make it very unlikely that a judge would hold them to be reasonably capable of referring to someone else, or that a jury would hold that they did so refer. This is particularly so in the case of statements which purport to deal with actual facts. If there is a risk of coincidence it ought, I think, in reason to be borne not by the innocent party to whom the words are held to refer, but by the party who puts them into circulation. In matters of fiction, there is no doubt more room for hardship. Even in the case of matters of fact it is no doubt possible to construct imaginary facts which would lead to hardship. There may also be hardship if words, not on their faces defamatory, are true of A, but are reasonably understood by some as referring to B, and as applied to B are defamatory. But such cases must be rare. The law as I understand it is well settled, and can only be altered by legislation.

The appeal must be dismissed with costs.

MACKINNON L.J. The arguments in this case have ranged over a wide field, and we have been referred to many authorities. I do not propose to examine those many cases, but to state the conclusions as to the law to which I have arrived after examining them.

If A publishes to another person, or persons, words which upon their reasonable meaning refer to B, if those words are defamatory as holding B up to hatred, ridicule, or contempt, and if the words so referring to B cannot be justified as true, A may be liable for damages to B.

Secondly, the reasonable meaning of the words, upon the question whether they refer to B must be tested objectively and not subjectively. The question is what do the words mean as words, not what did A in his own mind mean by them or intend them to mean.

Thirdly, A cannot plead as a defence that he was unaware of B's existence.

Fourthly, A cannot plead as a defence that the words are, in their reasonable meaning, equally capable of referring to C, and that when referring to C they are true.

Fifthly, there has been in some of the cases (notably by Farwell L.J. in *Jones* v. *E. Hulton & Co.* (1)), reference to negligence or recklessness on the part of A in making the publication. If the words, on their reasonable meaning, do refer to B, I think it is immaterial whether A was either negligent or reckless in not ascertaining the existence of B, or guarding against the applicability to him of the words. If B establishes his claim, the jury in assessing his damages may take into account all the circumstances of the publication. The negligence or recklessness of A may well be among such circumstances. Further or otherwise negligence or recklessness on the part of A is immaterial.

It is hardly necessary to add, sixthly, the rule which is elementary, namely, that it is the primary duty of the judge to decide whether the words complained of are capable of a meaning that is defamatory of B, and only if he answers that question in the affirmative to leave to the jury the questions whether they are in fact defamatory of B, and, if so, what damages he shall be awarded.

In a case in which there is no question that the words are defamatory of him, if they refer to B, and the contest is only whether they do so refer, this preliminary question for the judge must be: "Are these words on their reasonable "meaning capable of referring to the plaintiff?" And if he answers that affirmatively I think that, properly, the first question to be left to the jury should be: "Could the words "used by the defendant be reasonably interpreted by those

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(1) [1909] 2 K. B. 444, 480.

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"to whom they were published as referring to the plaintiff ?" On the first question, not exactly in that form, that was left to them, the jury failed to agree. Counsel for the defendants submitted that there was no evidence fit to go to the jury on which they could properly answer this first question in the affirmative. The judge overruled this contention: he therefore said that the case must be left for trial by another jury if the plaintiff chose to enter it again for trial. The defendants appeal from this ruling, though they also raise other contentions in law, some of which I have previously dealt with adversely to them.

In my opinion the question for us is whether the judge was right in ruling that there was evidence fit to be left to the jury on which they could reasonably answer "Yes" to the question: "Could the words used by the defendants be "reasonably interpreted by those to whom they were published "as referring to the plaintiff ?" In form this may not be precisely the same as the preliminary question for the judge's determination: "Are the words capable of being defamatory "of the plaintiff ?" But I think the difference is one of form and not of substance. For I think that truly the preliminary question for the judge is: "On the evidence is it possible for "a reasonable jury to answer the above question affirmatively?'

My brethren are of opinion that the judge's ruling as to this was correct. I confess that I entertain grave doubt whether it was. That doubt is not sufficient to make me express an actual dissent, especially as I think there is another ground on which this appeal should be allowed. But I should like to indicate the reasons which make me doubt.

In considering the judge's preliminary question whether the words are capable of being defamatory, and ought he therefore to leave to the jury the question whether they are so, what type of mind or intelligence ought the judge to impute to the audience ? Not, I think, that they are of the class who accept and act on the wickedest proverb that was ever invented: "There is no smoke without fire." On the other hand, perhaps he should not impute to them the charitable decency of gentlemen. I can only suppose that one must have recourse again to that elusive being "the reasonable "man," and assume that the audience consists of "reasonable "people."

Secondly, in considering what is the reasonable meaning of words uttered, not merely the actual words, but the circumstances of time and place must be taken into account, and also the constitution of the audience to whom they were addressed.

The audience of a general newspaper is the general public. (Judging from the specimens furnished for our inspection the audience of the defendants' paper must be the more vulgar and unintelligent portion of the general public). Words in such a paper may have a meaning other than they may have in a local paper addressed to a local audience. And words in a letter addressed to a few people, or even to an individual, may have a still more special signification. I would suggest as the two extremes of generality and speciality, (*a*) a paragraph in The Times: "John Smith of London, was "convicted at the Old Bailey of so and so," and (*b*) a letter to a householder at his address: "I think it right to let you "know that your gardener, A. B. is stealing your vegetables "and selling them to the local greengrocer." It seems manifest that The Times could not be successfully sued by a John Smith, who was not the convict; and equally manifest that, if the letter was untrue, the gardener could sue the writer.

If a newspaper printed the sentence: "A. L. Smith, a London "man, was fined for drunkenness at Bow Street," and a man of that name alleged these words to be defamatory of him, I think the judge ought not to let his case go to the jury. But if, forty years ago, a man exhibited a poster at the gate of Balliol, or outside the Law Courts, bearing the words: "A. L. Smith fined for drunkenness," either of two distinguished people, if they cared to sue, should have had their cases left to the jury. The words published to the audiences—undergraduates of Balliol, or lawyers leaving the Courts—would have a special meaning.

In *E. Hulton & Co.* v. *Jones* (1), the nature of the audience may have had some minor importance. The plaintiff was a well known barrister on the North Wales and Chester Circuit, and that is a region not far from Manchester. But the sting of the words in that case arose from his very unusual name. In all probability there was only one "Artemus Jones" in Great Britain, possibly in the world. If the paper had written of the doings at Dieppe of John Jones, I am clear that no one of the many men who struggle through life under the name "John Jones" ought to have had a claim left to the jury. And if the article had said "Jones" simpliciter, neither Mr. Artemus Jones, or any other Jones, could have sued.

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(1) [1909] 2 K. B. 444.

If the words may have a special significance to the audience, by reason of some local, or other, circumstance, how far is the special knowledge of some members of that audience to be considered in estimating the reasonable meaning of the words to those members? If the audience be a local one, e.g., if the words in this case had been printed in a Camberwell newspaper, the percentage of readers who knew of the existence of the plaintiff might have been much greater than the percentage of readers of the Manchester Guardian—if I may assume, solely for the sake of argument, that that austere journal could ever have printed this trash. In *E. Hulton & Co.* v. *Jones* (1) every reader (except those who thought the name merely fictitious, or did not think about it at all), would reasonably think the plaintiff was referred to. It was in evidence in that case that the plaintiff was baptized "Thomas "Jones," and had only assumed the name Artemus when he came to years of discretion. If the position had been reversed, and he had dropped the name Artemus when a boy, and had sued Hulton, saying "My real name is Artemus. I have "not used that prænomen for many years. But I can call "one of my schoolfellows, and an aunt, who will say they "once knew me as Artemus, and, being disagreeable and "suspicious people, will say they thought this story of "piccadillos at Dieppe referred to me"—I think he should have been non-suited.

There is implicit also this further consideration. If the special knowledge of a section of the audience consists only of their personal acquaintance with the plaintiff, and if he is a man of good character, he needs all the less any protection from any imputation on that character in their minds, if they are reasonable people. The better his character the more likely are those who know of him (unless they are unreasonably uncharitable) to say: " As usual, when one knows anything "of one's own knowledge, a newspaper gets it wrong." Indeed, the smaller the percentage of the specially informed part of the audience, and the higher the character of the plaintiff, the more remote is the possibility of any real damage to him from the suggested defamation.

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(1) [1909] 2 K. B. 444.

On the facts of this case—(*a*) the audience, to whom the words were published, was very widespread and numerous, while the percentage of it with special knowledge, i.e., acquaintance with the plaintiff, was infinitesimal, and (*b*) the name, Harold Newstead, is a very ordinary one, and may well be owned by more than one person. As the question is whether the few people who knew of the plaintiff would be acting as reasonable people in thinking, without further inquiry, that the words referred to the plaintiff, and at once holding him in ridicule, hatred, or contempt, I confess that, unassisted by the view of my brethren, I should be inclined to answer " No." I should be inclined to think that they could only do so if they were more stupid, and more uncharitable than I hope reasonable people are.

There is, however, another and different ground on which I think this appeal should be allowed. We are encouraged and entitled to assume that any jury consists of twelve reasonable people, though, paradoxically, tradition forbids us to interfere when a jury has assessed damages at a figure that we all think extravagantly excessive. In this case the jury did assess the damages, if the words did defame the plaintiff, at one farthing. It is true that they did not bring in a complete verdict, since they failed to agree on the first question. But they expressed their unanimous opinion as to the amount of damages. I suppose I am still entitled to regard them as twelve reasonable people, even if they failed to agree on a question which has virtually caused disagreement between my brethren and myself. I know, therefore, that twelve reasonable people have assessed the plaintiff's possible damages at one farthing. And, on the facts proved, I cannot conceive that any twelve reasonable people would arrive at a larger figure.

MacKinnon L.J.

It is said that we are bound to permit, if not to direct, a further trial of this case, and if another jury disagrees, yet another, and so on. That is in order that eventually some jury may answer "No" to the first question, or, answering "Yes" to it, may give the plaintiff the farthing which one jury has already agreed upon, and which I am satisfied any reasonable jury would agree upon.

I do not think we are constrained to adopt this course. For I think we sit here to administer justice, and not to supervise a game of forensic dialectics.

This ground, on which I would allow this appeal, is similar to that which was applied by this Court in the case of *Poliakoff* v. *News Chronicle Ld.* (1), though with a slight but, as I think, an immaterial extension. For in that case the Court was made aware of the fact that, the only conceivable damages being one farthing, the defendants had paid into Court a sum in excess of that figure.

DU PARCQ L.J. The submissions upon which the appellants rely may be stated shortly as follows: (1.) That the evidence would not have justified a finding by the jury that reasonable persons would have understood the words complained of to refer to the plaintiff. The ground of this submission is that the words were not capable of such a meaning. (2.) That, even assuming that the words were capable of a meaning defamatory of the plaintiff, the fact that they were true of another person affords a good defence to the appellants.

As to (1.), there is a clear distinction between the question which a jury may have to answer, and the preliminary question which is for the Court. The question for the Court is, to adopt the language of Lord Halsbury, whether the words are

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(1) [1939] 1 All E.R. 390.

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"susceptible of a libellous meaning in this sense, that a "reasonable man could construe them unfavourably in such "a sense as to make some imputation upon the person complaining." *Nevill* v. *Fine Art and General Insurance Co.* (1) If the judge holds the words to be susceptible of a defamatory meaning in that sense, the jury are the constitutional tribunal to decide whether the words in fact have that meaning—whether, that is, the reasonable man whom they may be supposed collectively to typify *would* (not could) so construe them. The question which the judge must put to himself involves the assumption that the hypothetical reasonable man is capable of forming what the jury (and perhaps the judge also) may think to be an unduly censorious or suspicious view. The judge must be careful not to answer in advance the question which is properly for the jury, and to observe the limitation imposed upon his proper function by the law. At the same time he must not shrink from withdrawing the case from the jury if he is satisfied that no reasonable man "could" (not "would") attach to them the defamatory meaning alleged.

I express no opinion as to the answer which the jury ought to have made to the first question left to them by Hawke J. I am, however, clearly of opinion that the learned judge was right to leave the question to the jury. There was evidence, in my opinion, which would justify a jury in finding, in the language of the statement of claim, that the description "Harold Newstead, thirty-year-old Camberwell man" substantially fits the plaintiff." The plaintiff is known as a hairdressers' assistant to a comparatively wide circle of customers and other acquaintances in Camberwell, where he has acquired a modest fame. A reasonable man who had some acquaintance with him might have been prudent enough, on reading the alleged libel, to say: "This may refer to some "other Harold Newstead": but I am not satisfied that every reasonable man would necessarily have been so cautious. The man who believes no ill of his neighbour until the accusation is proved beyond doubt against him is without question a reasonable man; but it would be fallacious to

(1) [1897] A. C. 68, 76–7.

argue that every reasonable man attains to that high standard of judicial fairness. Evidence proving the existence of another person to whom the words might have been taken to refer is only relevant to this first question because it proves the words to have been capable of more than one meaning, and of at least one meaning which would not be defamatory of the plaintiff. It cannot now be argued (in this Court, at any rate) that "if words are capable of several meanings, some "defamatory and some innocent, they should not be left to "the jury." The correct view is that if the words are reasonably capable of two or more meanings, of which one is defamatory, it must be left to the jury to determine in which sense a reasonable man would understand them: see the judgment of Scrutton L.J. in *Cassidy* v. *Daily Mirror Newspapers.* (1)

If I am right in rejecting the appellants' first submission, it is necessary to come to a decision on the interesting and difficult question raised by the second. In my opinion it is now settled law that "liability for libel does not depend "on the intention of the defamer; but on the fact of "defamation": *Cassidy* v. *Daily Mirror Newspapers.* (2) I quote these words of Russell L.J., as he then was, as conveniently summarizing the effect of his own judgment, and of that of Scrutton L.J. in *Cassidy's* case (1), and as clearly stating the principle established by *E. Hulton & Co.* v. *Jones.* (3) It seems to me to be impossible, consistently with this principle, to make the defendant's liability depend on the accuracy of his words in relation to some person, other than the plaintiff, at whom he says he meant to strike. Nor do I think, with the greatest respect for the view expressed by Farwell L.J. in *E. Hulton & Co.* v. *Jones* (3), that any doctrine which would make the defendant's liability depend upon his state of mind, or the degree of care which he exercised, is reconcilable with this principle. In the present case, and in any similar case in which a defendant says that he was only speaking the truth of another person and not meaning to attack the plaintiff, it may well be right to direct the jury that a reasonable man must be aware of the possibility (it is for them to say in each case whether it amounts to a probability) that in any district there may be more than one person of the same name, and that, in considering how a reasonable man would understand the words, they must assume that he will read them with such care as may fairly be expected of him, not ignoring any parts of the description which are inapplicable to the plaintiff. If a defendant has been careful and precise, he may by his care avoid the risk of a successful action ; but he cannot in my opinion escape liability merely by showing that he was careful and that his intentions were good. The Master of the Rolls has dealt fully with this part of the case, and I would add that I find myself in complete agreement with all his observations upon it.

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(1) [1929] 2 K. B. 331, 339.
(2) Ibid. 354.
(3) [1909] 2 K. B. 444; [1910] A. C. 20.

If these two submissions on the part of the appellants are rejected, it follows, in my opinion, that the learned judge was right in holding that the case had yet to be tried. Mr. Slade suggested, however, that it would be proper to make an order limiting the trial to the issue of liability, and to treat the quantum of damages as having been already the subject of a decision. It is, I think, plain that this Court would have no power to take that course, even if it commended itself to us. This is not a case in which a new trial is being sought, or in which a verdict has been given on one issue. The answers of the jury do not amount to a verdict, so that there has been no verdict and no trial. When a jury has failed to agree on the question of liability, its opinion as to what the damages should have been can have no legal effect.

If this Court were to say that such an assessment of damages must stand, it would in effect be adopting the jury's assessment of damages as its own ; or, in other words, itself deciding what damages ought to be awarded, a decision which it has no power to make: see *Watt* v. *Watt.* (1) It is hardly necessary to add that this case is clearly distinguishable from one in which the issues joined on different causes of action have been left to a jury, who have returned a verdict on one or more

(1) [1905] A. C. 115.

of them, and been unable to agree as to the others. See, for instance, *Marsh* v. *Isaacs*. (1) It is equally plain that Order xxxix., r. 7, of the Rules of the Supreme Court has no application to a case where the Court is not granting a new trial but, on the contrary, is holding that there has not yet been a trial. In the circumstances, I prefer to express no view as to the adequacy of the amount assessed by the jury.

I agree with the Master of the Rolls in thinking that the appeal should be dismissed and it becomes unnecessary to decide the questions raised by the cross appeal.

Appeal dismissed.

Solicitors for appellants: *Shirley Woolmer & Co.*
Solicitors for respondents: *Manches & Co.*

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(1) (1876) 45 L. J. (Q. B.) 505.

P. J. B.

BUTLER *v.* STANDARD TELEPHONES AND CABLES, LIMITED.

1939
Dec. 7, 8, 11, 13, 14, 20.

McCARTHY *v.* SAME.

Nuisance—Adjoining owners—Damage by roots of trees.

The plaintiffs' houses were damaged by roots of trees on the defendants' adjoining land burrowing under the walls of the houses and causing the soil to shrink through abstraction of moisture:—

Held, that the defendants were liable in damages to the plaintiffs.

Middleton v. *Humphries* (1912) 47 Ir. L. T. 160, approved and applied.

CONSOLIDATED ACTIONS tried by Lewis J. without a jury.

The defendants, Standard Telephones and Cables, Ld., were the owners and occupiers of a sports ground at Eltham, Kent. To the west of it ran a road called Green Lane, and between Green Lane and the sports ground was a row of semi-detached houses. Access to the sports ground from Green Lane was obtained by a strip of land about 40 feet wide and 100 feet long, also owned and occupied by the defendants, which was fenced on the north and south sides with wooden fences, and ran between 83, Green Lane, owned and occupied by the plaintiff, John William McCarthy, on the north side, and 85, Green Lane, owned and occupied by the plaintiff, Frederick Thomas Butler, on the south side.

The plaintiff, McCarthy, went into possession of his house in 1928. In 1930 or 1931 the defendants planted two rows of Lombardy poplars along the approach from Green Lane to the sports ground, each row being about 3 feet inside the wooden fences. At the time of the trial their average height was over 40 feet. In 1934 McCarthy found signs of a very severe settlement in his house. He did not know the cause, but underpinning of the flank wall remedied it for the time being. Excavations then made showed that roots from the poplars had burrowed under the wall. Those were cut back, but in 1937 trouble again arose and cracks made themselves manifest in the wall. It was not disputed that McCarthy's house then showed serious signs of settlement.

The plaintiff, Butler, noticed no trouble till 1937, when his house suffered similarly to that of McCarthy's. It was quite clear that the roots of the poplars had spread under the walls of the houses on both sides of the approach, and the plaintiffs alleged that the subsidence was due to the consequent disintegration of the clay on which the houses were built. They brought their action alleging that the defendants had been guilty of nuisance, trespass, and wrongful interference with their right to support. In the alternative, they claimed damages for negligence and for wrongful removal of water from the soil by the trees, and they asked for an order to cut down the trees and an injunction to prevent the continuance of the injury to the plaintiffs' houses by their roots. It was not disputed that the cause of the settlement of the two houses was the shrinkage of the clay, but the defendants denied that it was caused by the poplars, and alleged that it resulted from exceptional periods of drought in 1934 and 1937. On this issue of fact Lewis J. found in favour of the plaintiffs. The defendants, however, contended that, even if the trees were to blame, that did not give the plaintiffs any cause of action. The damages were agreed between the parties, subject to the determination of the issue of liability.

Manningham-Buller and *J. C. Lawrence* for the plaintiffs. An owner of property has a right to recover compensation for damage done to his property by the roots of trees belonging to an adjoining owner, just as he has a right to recover in respect of damage done by overhanging boughs: Gale on Easements, 11th ed., p. 438; *Crowhurst* v. *Amersham Burial Board*. (1) Passages in *Lemmon* v. *Webb* (2) support this view. (See also report of *Smith* v. *Giddy* in Law Journal Reports. (3)) Accordingly, the defendants have been guilty of a nuisance for which the plaintiffs are entitled to damages. [They also

(1) (1878) 4 Ex. D. 5.

(2) [1894] 3 Ch. 1, 14, 16, 18, 20, 24.

(3) [1904] 2 K. B. 448; 73 L. J. (K. B.) 894.

cited *Donoghue* v. *Stevenson* (1) for the application of the principle "sic utere tuo ut alienum non lædas."] It must be admitted that *Chasemore* v. *Richards* (2) and *Popplewell* v. *Hodkinson* (3) established that there is no remedy if the acts of one's neighbour on his own land cause water which is not in any defined channel to flow off one's land. If therefore the subsidence was due to abstraction of water from the plaintiffs' land by the defendants' acts on their own land, the plaintiffs would have no right of action, but there is no authority which says that my neighbour may put a drain on my land and abstract water, and these roots in fact acted as drains.

McGougan (*Havers K.C.* with him) for the defendants. There is no English decision as to liability for damage done to property by roots, and the assumption seems to have been made that a nuisance by encroaching roots is the same as an encroachment by overhanging boughs. The position, however, is far from plain. The principle enunciated in *Blake* v. *Woolf* (4) was discussed at considerable length in *Rickards* v. *Lothian* (5), where the Privy Council accepted that a landowner is not liable to his neighbour for damage done in the course of the normal user of his land. All the cases in which landowners have been held liable for damage done by overhanging boughs have been applications of *Rylands* v. *Fletcher* (6), or based on negligence. The inclusion of negligence in this connection goes back to *Earl of Lonsdale* v. *Nelson* (7) which was referred to by Wright J. in *Noble* v. *Harrison*. (8) The latter judgment cannot be ignored in dealing with the question of damage by roots, for it was there held that the fall of the bough which caused a nuisance could not be attributed to negligence, since it was due to latent defect. Wright J. there said that the planting of a tree on a boundary is a normal user of land, and is not sufficient to bring the case within *Rylands* v. *Fletcher*. (6) In the cases of overhanging boughs there was a visible

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(1) [1932] A. C. 562, 580.
(2) (1859) 7 H. L. C. 349.
(3) (1869) L. R. 4 Ex. 248.
(4) [1898] 2 Q. B. 426.
(5) [1913] A. C. 263.
(6) (1868) L. R. 3 H. L. 330.
(7) (1823) 2 B. & C. 302.
(8) [1926] 2 K. B. 332, 339, 342.

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extension of the boughs over the neighbour's land, and, if damage ensued, the clearest invasion of the neighbour's rights, which the owner of the tree ought to have seen, but the outgrowing of roots which are invisible is totally different and on that ground the present case is distinguishable from the overhanging bough cases. It is extending the law a good deal further than it has ever gone to suggest that the planting of boundary trees, not being poisonous, causes liability because damage is caused by the absorption of moisture by their roots.

Manningham-Buller in reply. Planting trees close to the wall of neighbouring houses is not normal user of land. *Noble* v. *Harrison* (1) affords no assistance, the English cases nearest in point being *Smith* v. *Giddy* (2) and *Lemmon* v. *Webb*. (3) There is, however, an Irish case directly in point, *Middleton* v. *Humphries* (4), where Ross J. held the defendant liable for damage caused by roots of trees.

Cur. adv. vult.

1939. Dec. 20. LEWIS J. [after finding in favour of the plaintiffs on the issues of fact :] There is, apparently, no English case recorded in the books of an action having been brought for nuisance resulting in damage to property by the action of the roots of a tree. There are many cases of actions brought in respect of damage caused by overhanging branches, but it would seem that the only instance of an action for damage caused by the roots of a tree is an Irish case, *Middleton* v. *Humphries*. (4) There the plaintiff alleged that his wall had collapsed owing to the action of the roots of a tree on the defendants' land which had burrowed under it. Ross J. had no doubt that that gave a cause of action just as though the wall had been damaged by the overhanging branch of a tree on the defendant's land, and he granted an injunction restraining the defendant from continuing to permit the injury and awarded damages. That decision—which I think is perfectly right—draws no distinction either in law or in fact between damage caused by overhanging branches and damage caused by roots which burrow under the ground. The author of Gale on Easements, 11th ed., p. 438, takes the same view, and that passage has been cited with approval.

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(1) [1926] 2 K. B. 332.

(2) [1904] 2 K. B. 448.

(3) [1894] 3 Ch. 1.

(4) (1912) 47 Ir. L. T. 160.

It seems to me that not only is there a right for a plaintiff whose property has suffered from the roots of a tree belonging to his neighbour to cut the roots of the offending tree, but he is also entitled to recover damages if damage has been suffered by him owing to the action of the roots.

Of the cases which Mr. Manningham-Buller cited to me I need only refer to *Smith* v. *Giddy* (1), and particularly to the judgment of Kennedy J.; *Crowhurst* v. *Amersham Burial Board* (2) and *Lemmon* v. *Webb.* (3) In the last-named case Kay L.J. summed up the authorities on this part of the law in these words: "The result of the authorities seems to be "this:—The encroachment of the boughs and roots over and "within the land of the adjoining owner is not a trespass or "occupation of that land which by lapse of time could become "a right. It is a nuisance. For any damage occasioned by "this an action on the case would lie. Also, the person whose "land is so affected may abate the nuisance if the owner of "the tree after notice neglects to do so."

I am satisfied that in law this action will lie and that, in view of the facts which I have found, the plaintiffs are entitled to recover.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Janson, Cobb, Pearson & Co.*
Solicitors for defendants: *Merrimans.*

(1) [1904] 2 K. B. 448, 451.
(2) 4 Ex. D. 5.
(3) [1894] 3 Ch. 1, 24.

J. W. H.

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1939
Nov. 13.

G. T. HODGES AND SONS *v.* HACKBRIDGE PARK RESIDENTIAL HOTEL, LIMITED.

[1938. H. No. 2331.]

Principal and agent—House agent—Offer to sell at specified price—Introduction of compulsory purchaser—Compulsory acquisition for compensation below price required by vendor—Efficient cause of sale—Right of agent to commission.

A house and estate agent employed on commission to sell property for a specified price does not earn commission if the party whom he introduces is a Secretary of State who, in the exercise of his statutory powers, acquires the property compulsorily.

Toulmin v. *Millar* (1887) 58 L. T. 96, rule stated by Lord Watson applied.

Appeal from the judgment of Lewis J. in an action tried by him without a jury.

The plaintiffs, G. T. Hodges & Sons, were house and estate agents, carrying on business at Mitcham, Surrey. The defendants were a limited company owning the Hackbridge Park Residential Hotel and grounds at Hackbridge, Surrey.

In November, 1933, the plaintiffs wrote to the defendants that they had a client on the look out for land for building purposes and asking the defendants if they were prepared to sell their hotel and grounds. The defendants, by their managing director, Mr. Edward Pendlebury, replied that the price required was 8750*l.* Between that time and February, 1934, the plaintiffs were in correspondence with various builders regarding the property, but no offer was made to purchase at the price named, and that correspondence thereupon ceased (though the plaintiffs still kept the property on their books) and the relationship between the plaintiffs and defendants for the purpose of selling came to an end.

On November 11, 1936, another firm of house agents, Messrs. Whiteman & Co., wrote to the plaintiffs as follows: "Referring to our conversation over the telephone we have "an inquiry from a Colonel Cannon for a site of about four "acres for the purposes of erecting a hall with sports ground "attached, and we shall be glad if you can let us have particulars of any sites available . . . . Our services are not "being retained and in the event of business resulting we "would have to look to you for a moiety of your commission "in the usual way." On November 18, 1936, the plaintiffs replied mentioning the defendants' said property and giving some particulars regarding it.

On November 21, 1936, Colonel Cannon, who commanded the 31st City of London Rifles A. A. Battalion, accompanied by the plaintiffs' representative, Mr. R. W. Hodges, visited the property and there met Mr. Pendlebury.

On December 22, 1936, Colonel Cannon again visited the property in company with Mr. Hodges, and was shown over it by Mr. Pendlebury's secretary.

On January 1, 1937, the plaintiffs wrote to the defendants that Colonel Cannon was interested in the property and that they had stated to him the price which the defendants had originally mentioned in 1933.

On January 13, 1937, a meeting took place at the premises between Colonel Cannon and Mr. Pendlebury, at which the former offered for the premises 8750*l.*, the price that had been mentioned to him by the plaintiffs, but Mr. Pendlebury, after asking for 15,000*l.*, would not accept less than 12,500*l.*

Colonel Cannon was able and entitled to negotiate for the purchase of the premises at the figure which he offered, but he was really acting directly or indirectly for the War Department, and that Department, on hearing of the premises, became desirous of purchasing them for the City of London Territorial Army Association.

By a notice to treat dated June 19, 1937, and made under the Defence Acts, 1842 to 1935; the Ordnance Board Transfer Act, 1855 (18 & 19 Vict. c. 117); the Lands Clauses Consolidation Acts Amendment Act, 1860 (23 & 24 Vict. c. 106), s. 7; and the Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 Geo. 5, c. 57), notice was given to the defendants that the Secretary of State for War required

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to purchase absolutely the defendants' said premises; that he offered to treat with the defendants for such purchase; that the defendants were thereby required to treat with him as to the amount of purchase money, compensation or consideration to be paid in respect of the same; and that if within fourteen days they refused or declined to treat or agree as to that amount or were prevented from so doing, the Secretary of State might require the amount to be settled pursuant to the Acts and might apply thereunder for possession of the premises.

By an offer in writing dated September 30, 1937, the Secretary of State offered to the defendants 7500*l.* for the premises, that being the value put upon them by the official valuer.

Eventually, a reference took place between the defendants and the Secretary of State before the Official Arbitrator who, by an award dated May 30, 1938, awarded that the Secretary of State should pay to the defendants 7856*l.* for the premises; the Secretary of State thus in effect requisitioning the premises under his statutory powers.

On July 18, 1938, the plaintiffs brought the present action against the defendants alleging that in 1933 the defendants instructed them to sell the premises for 8750*l.*, and the plaintiffs agreed to attempt to do so on the usual commission: that in 1936 they introduced to the defendants Colonel Cannon, who was able and willing to pay that price, but that the defendants in breach of their agreement refused to sell at that price, whereupon the plaintiffs became entitled to their commission on that sum; that, alternatively, Colonel Cannon was acting for the War Department and that as the defendants refused to sell at that or any reasonable price, the War Department purchased the premises compulsorily for 7856*l.*, and the plaintiffs claimed commission alternatively on the latter sum.

The defendants in their defence said that they denied that they instructed the plaintiffs to sell their premises, that alternatively if in 1933 they instructed the plaintiffs to sell the premises for 8750*l.*, which was denied, no purchaser was introduced and the said instructions were cancelled, that the plaintiffs had no instructions in 1936 to sell the premises at that price or at all, that the defendants denied that they committed any breach of agreement, or that the plaintiffs became entitled to any commission, and that save that the Secretary of State for War purported to have acquired the premises compulsorily for 7856*l.* every other allegation in the statement of claim was denied.

On May 24, 1939, Lewis J. gave judgment. He found as a fact that if the defendants in 1933 gave any mandate to the plaintiffs to sell the property, that mandate was withdrawn in 1934. He was satisfied that when in 1936 the plaintiffs brought Colonel Cannon to the defendants there was no contract between them to the effect that if the plaintiffs got an offer of 8750*l.* they would be entitled to commission from the defendants. He was of opinion that no price was then agreed or even suggested between them. On the other hand the plaintiffs were entitled to commission if they introduced a purchaser, and there was no question that they in fact did introduce Colonel Cannon and the War Office. On the facts of the case the plaintiffs, who as the defendants knew were estate agents, produced to the defendants a purchaser, namely, the War Office who eventually under their compulsory powers purchased the property for 7856*l.*, and that entitled the plaintiffs to commission on that sum.

The defendants appealed. The appeal was heard on November 13, 1939.

B. Mark Goodman, for the defendants, appellants. The judgment under appeal is wrong in deciding that the plaintiffs are entitled to recover commission from the defendants. The defendants never at any time employed the plaintiffs as agents to sell their property. If in 1933 there was any employment by the defendants of the plaintiffs as such agents, that employment was terminated in 1934, as the judge has found, and no such employment can be inferred from the circumstances that have since existed. If at any time since 1934 the defendants employed the plaintiffs to sell their premises the plaintiffs have not observed the terms of their employment and therefore cannot recover commission. In order to found a legal claim by an agent for commission on a sale, there must not only be a causal but also a contractual relation between the introduction of the purchaser and the ultimate transaction of sale: *Toulmin* v. *Millar.* (1) The agent must not only introduce a purchaser, but a purchaser who is able and willing to purchase at the price and on the other terms offered by the vendor. He must also be instrumental in effecting the sale on these terms: *Millar, Son & Co.* v. *Radford* (2); *Nightingale* v. *Parsons* (3); and *Keppel* v. *Wheeler.* (4) He must be not only a causa sine qua non but the efficient cause of the sale. In the present case the plaintiffs no doubt introduced to the defendants the person who eventually acquired the defendants' property, namely, the Secretary of State for War. The plaintiffs did not, however, negotiate a "sale" of the defendants' property. They did not find a purchaser who was ready and willing to accept the defendants' offer to sell the property for the price required by them, namely 12,500*l.* Further, the transfer of the defendants' property to the Secretary for War was effected not voluntarily but compulsorily under statutory powers at the price of 7856*l.* Property of an owner commandeered by the Government is not sold by the owner to the Government, since it is not voluntarily transferred from the owner to the Government under a contract of sale: *Thompson* v. *British Berna Motor Lorries, Ld.* (5) A compulsory conveyance is not a conveyance on sale entitling the agent who brings it about to commission.

R. A. B. Powell, for the plaintiffs, respondents. Lewis J. rightly held that the plaintiffs were entitled to the commission which they claimed. The plaintiffs do not deny that the original mandate, which they say was given to them by the defendants to sell the property in question for 8750*l.*, was cancelled in 1934. They say, however, that they remained

(1) 58 L. T. 96.
(2) (1903) 19 Times L. R. 575.
(3) [1914] 2 K. B. 621.
(4) [1927] 1 K. B. 577.
(5) (1917) 33 Times L. R. 187.

in touch with the property retaining it and the price mentioned for it on their books, that in 1936 when they learned of Colonel Cannon's inquiry they mentioned the property to him and the price that the defendants had proposed for it, that they introduced him to the defendants and as estate agents showed him over the property, and that they obtained his consent to purchase it at that price. If the defendants had not departed from the price originally proposed by them a contract would at once have been concluded between them and Colonel Cannon for the sale of the property at that price, and the plaintiffs would clearly have earned their commission thereon. Owing to the refusal of the defendants to sell to Colonel Cannon on these terms an opportunity was given to the War Department to intervene and eventually under its statutory powers to institute arbitration proceedings and effect a sale at a lower price fixed by the official assessor. The sale by the defendants to the War Department must, however, be regarded as a voluntary sale. The notice to treat served on behalf of the Secretary for War upon the defendants stated that he required to purchase the defendants' premises and that he was willing and offered to treat and agree with the defendants for such purchase. The compensation awarded to the defendants by the arbitrator was assessed under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2, sub-s. 2, of which provides that in assessing compensation the assessor shall act in accordance with the rule that the value of the land shall be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realize. The sale to the Secretary for War being thus equivalent to a voluntary sale at an agreed price, the plaintiffs are entitled to succeed on their alternative claim for commission on that price.

SCOTT L.J. In this case Lewis J. gave judgment in favour of the plaintiffs in an action by a firm of house agents for commission. In my view the judge was wrong in the conclusion that he arrived at, for this primary reason: that the sale of the property in respect of which the agent was claiming a commission was a compulsory sale, the Government having requisitioned the property, and the price being a sum of compensation awarded by the official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919.

The origin, historically, of the relations between the plaintiffs, Messrs. G. T. Hodges & Sons, and the managing director of the defendants, the Hackbridge Park company, was that in 1933 the plaintiffs had been asked by the latter to find a purchaser at a minimum price of 8750*l.* But that attempt to sell came to nothing, and in 1934, as is found by the learned judge, the relationship between the plaintiffs as commission agents for the purpose of selling and the defendants, came to an end.

On November 11, 1936, other house agents, Messrs. Whiteman & Co., wrote to the plaintiffs in these terms: [His Lordship read the letter as above set out and continued :] That was written, of course, on the assumption that possibly the plaintiffs might find a vendor who was willing to sell to the Colonel Cannon there mentioned a suitable site and earn a commission from him on a sale to which he agreed. On November 18 the plaintiffs wrote to Messrs. Whiteman giving the name of the premises in question as the Hackbridge Park Hotel, with particulars.

After that Mr. R. W. Hodges on behalf of the plaintiffs went down to the site with the Colonel Cannon mentioned and inspected the grounds, meeting Mr. E. Pendlebury, the managing director of the defendant company. In evidence Mr. Hodges said that before he went " I rang up Mr. Pendle-"bury and told him I had an applicant. I asked him whether "I could show him over the grounds and he said ' Yes '."

Three inspections took place, and the price that Mr. Pendlebury was asking at that time was nearly twice what he had asked in the year 1933. It was 15,000*l.* Colonel Cannon said he was not going to buy at that price. He got Mr. Pendlebury to come down to 12,500*l.*, but he was not going to purchase at that price because he had learnt from Mr. Hodges that Mr. Pendlebury's original figure had been 8750*l.*

Then the matter went off, and so far as Mr. Hodges' claim to bringing about a sale for Mr. Pendlebury is concerned, nothing further happened, because Colonel Cannon, who was really investigating directly or indirectly on behalf of the War Office, reported about the place to the War Office with the result that the War Office requisitioned the whole estate under statutory powers, and an arbitration took place before the official arbitrator at which a price of between 7000*l.* and 8000*l.* was fixed by the arbitrator for the compulsory purchase.

On those facts the plaintiffs have no evidence to show that they earned any commission, though, had there been a voluntary sale, I think there would have been evidence of their being entitled to a commission. In the absence of a voluntary sale, however, there was no contractual relationship between what they did and the transfer of the estate under compulsion to the Government as the purchaser.

The rule laid down by Lord Watson in *Toulmin* v. *Millar* (1) is directly applicable. In that case, where there was a claim for commission on the sale of an estate by the plaintiff who was a London estate agent, Lord Watson said: "It is "impossible to affirm, in general terms, that A. is entitled "to a commission if he can prove that he introduced to B. the "person who afterwards purchased B.'s estate, and that his "introduction became the cause of the sale. In order to "found a legal claim for commission, there must not only be "a causal, there must also be a contractual relation between "the introduction and the ultimate transaction of sale."

It is just that gap that exists in the facts of this case. In a certain sense the plaintiffs had been a causal connection between the defendants and the War Office, the compulsory purchaser, but there was no contractual relationship between these parties which would entitle the plaintiffs to say that according to the terms of the defendants' employment of them they had found for the defendants a ready and willing purchaser at a price which the defendants had voluntarily accepted. It is that contractual element forming the necessary

(1) 58 L. T. 96.

element to entitle the plaintiff to his commission which is absent in this case.

The facts were, that Mr. Pendlebury for the defendants said that they were not willing to sell for less than 12,500*l.*, and the next event in the transaction no doubt was that that figure was reported to the War Office, who said that they were not going to pay that price. They then gave notice to treat under the compulsory powers in the Acquisition of Land (Assessment of Compensation) Act, 1919, and that led to the fixing of the compensation at a sum much less than the price offered by the defendants. In my opinion the learned judge erred in thinking that because in effect the plaintiffs may have been the originating cause of the relationship between them he was therefore entitled to commission. In my opinion the appeal should be allowed with costs here and below.

Clauson L.J. I agree. Put at its highest, the relations between the defendants and the plaintiffs were such that if the plaintiffs had procured a purchaser for the defendants' property at a price which the defendants were willing to accept, the defendants would have been bound to pay him a commission for his services. What the plaintiffs in fact did was to start a train of causes which ultimately led to the defendants' property being taken away from them against their will in exchange for compensation at a figure some 4000*l.* or more less than the price which the defendants were asking, and a sum of 900*l.* less than the lowest figure they had ever at any time contemplated accepting. How that can result in a liability upon the defendants to pay commission to the plaintiffs, I must confess that I fail to understand.

Goddard L.J. I agree. If one employs a house agent to undertake the sale of one's property, the last thing one employs him to do is to find a person who requires one to sell one's property to him at a price which one is not willing to accept.

When the plaintiffs were approached by Messrs. Whiteman and were told that they had a client, a Colonel Cannon, who was looking for some land for the purpose of erecting a hall with a sports ground, and were asked whether they knew of any suitable property, and the plaintiffs wrote back mentioning the defendants' property, and by arrangement with Messrs. Whiteman and with the defendants' permission Colonel Cannon was shown round the property by the plaintiffs, and then a price was mentioned by Mr. Pendlebury which ultimately came down to 12,500*l*. If Colonel Cannon had been willing to pay that price, either out of his Territorial Association's funds, quite apart from the War Office, or out of his own pocket, I have no doubt that the plaintiffs would have been entitled to commission, because they would have introduced a person who was willing to pay the price asked by Mr. Pendlebury, and Mr. Pendlebury would have accepted that person as the purchaser, and thereby have taken advantage of the plaintiffs' efforts.

But, unfortunately, that is not what happened. Colonel Cannon was not willing to pay the price asked, which was the only price at which Mr. Pendlebury was willing to sell at that time. Thereupon the Government intervened. Using the powers vested in the Secretary of State under the Defence of the Realm Act, they served a notice to treat on the defendants; but directly a notice to treat is served, although for certain purposes a notional contract is entered into between the undertakers and the person on whom the notice is served, there is no contract in the true sense of the word, and any question of commission is removed from the scope of the transaction. From that moment the so-called purchaser is in a position to expropriate the owner whether he likes it or not on paying a price which used to be fixed by arbitration under the Lands Clauses Act and is now fixed under the Acquisition of Lands (Assessment of Compensation) Act. That state of affairs which ultimately came about, in one sense was due to the efforts of the plaintiffs, but, as I have said, one does not employ a house agent to effect a transaction which is a disservice to him, but one employs him to effect a transaction which is of service to him, and as this transaction ended in the defendants being expropriated

C. A.
1939

Hodges (G. T.) & Sons v. Hackbridge Park Residential Hotel, Ld.

from their premises and land, and having to accept a price at which they were not willing to sell, it is impossible to say that the plaintiffs have earned a commission out of any employment which was conferred upon them by the defendants.

Appeal allowed.

Solicitor for appellants: *William Charles Crocker.*
Solicitors for respondents: *Lees, Smith, Crabb & Matthew.*

J. R.

CATOR *v.* NEWTON.

BATES, THIRD PARTY.

C. A.
1939
Nov. 20.

Land transfer—Registered land—Vendor under covenant to maintain roads—Entry on register relating to covenant—Liability of purchaser to indemnify vendor—Land Registration Act, 1925 (15 *Geo.* 5, *c.* 21), *s.* 20, *sub-s.* 1.

The defendant, as registered owner of freehold property, was under covenant to contribute to the maintenance of roads, etc., on an estate. The register contained an entry that the property was subject to this covenant. The defendant conveyed the property to the third party, who did not expressly agree to indemnify the defendant against his liability under the covenant to maintain:—

Held, that, although the covenant to maintain was entered on the register, s. 20, sub-s. 1, of the Land Registration Act, 1925, did not operate to render the third party liable to indemnify the defendant in respect of his liability under it.

APPEAL from Bromley County Court.

On November 19, 1919, the defendant purchased from the plaintiff a property, the conveyance containing a covenant that he would repay to the owner for the time being of the estate on which the property was situated a share of the cost of the maintenance and repair of the roads, paths, drains, etc., on the estate. The defendant was registered at the land registry as the owner with an absolute title of the property and an entry was made on the register stating that the property was subject to the covenant mentioned. On April 27, 1928, the defendant conveyed the property to the third party, there being no covenant by the third party in the conveyance indemnifying the defendant against his liability under the covenant in the deed of November 19, 1919, to contribute to the maintenance of the roads, etc. In 1939 the plaintiff instituted in the county court proceedings against the defendant in which he claimed 6*l.* 18*s.* 1*d.*, being a share of the cost of the maintenance of the roads, etc., under the covenant. The defendant brought in the third party and claimed to be indemnified by him. The county court judge gave judgment for the plaintiff against the defendant on the claim and for the third party against the defendant on the issue of indemnity. The defendant appealed against the county court judge's order in favour of the third party.

J. V. Nesbitt for the defendant. The defendant was entitled to the indemnity which he claimed although there was no covenant of indemnity in his conveyance to the third party. By s. 20, sub-s. 2, of the Land Registration Act, 1925 (1), a disposition of the registered land confers on the transferee an estate subject "to the incumbrances and other entries, if any, "appearing on the register." The covenant to maintain and repair the roads was the subject of an entry on the register before April 27, 1928, and, therefore, the third party took the property from the defendant subject to that covenant.

R. S. Lazarus for the third party was not called on to argue.

LUXMOORE L.J. delivered the judgment of the Court (Slesser and Luxmoore L.JJ., and Atkinson J.) in which he stated the facts and continued:

There being no express covenant of indemnity in the transfer of the property by the defendant to the third party, the defendant has no right of indemnity against the third party unless, as has been argued, the result of s. 20, sub-s. 1, of the Land Registration Act, 1925, is that the third party took subject to the covenant to maintain the roads, etc., that covenant being the subject of an entry appearing on the register. In my judgment, it is impossible to spell any such result out of the words of the section which merely says that the transferee shall take "subject . . . . to the incumbrances "and other entries . . . . appearing on the register." The benefit and burden of a positive covenant, it is to be observed, do not pass to a purchaser except by express provision to that effect, and if, as is the case here, the entry simply refers to a positive covenant the burden of which has not been assigned, the transferee cannot be said to be subjected to that burden merely because the section says that he takes subject to the entry. His legal liability is not affected. In the present case the third party is not by the section made liable to the plaintiff in respect of the maintenance of the roads, etc., nor can we see how he is made liable to indemnify the defendant. In these circumstances we think that the decision of the county court judge was right and that this appeal must fail.

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(1) By Land Registration Act, 1925, s. 20, sub-s 1: "In the case of "a freehold estate registered with "an absolute title, a disposition "of the registered land . . . . for "valuable consideration shall, "when registered, confer on the "transferee or grantee an estate "in fee simple . . . . subject— "(*a*) to the incumbrances and "other entries, if any, appearing "on the register; . . . ."

Appeal dismissed.

Solicitor for appellant: *W. G. Weller.*

Solicitors for respondent Bates: *Jutsum, Jones, Arthur & Light.*

G. F. L. B.

C. A.
1939
Nov. 21.

SCHAFFER *v.* ROSS.

Landlord and tenant—Rent restriction—Dwelling-house—House unlet at the date of passing of Acts of 1920 *and* 1923*—Increase of Rent and Mortgage Interest* (*Restrictions*) *Act,* 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 2*—Rent and Mortgage Interest* (*Restrictions*) *Act,* 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-s.* 1.

By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 2, the Act is to apply to "a house or part "of a house let as a separate dwelling," where the rent or rateable value is below a given figure :—

Held, that this provision is not limited to a house let as a separate dwelling at the time of the passing of the Act, but extends to a house let to a tenant for the first time after that date.

Similarly, the word "landlord" as used in the Rent and Mortgage Interest (Restrictions) Act, 1923, s. 2, sub-s. 1, does not necessarily imply the existence of a tenant at that time, but includes the owner of a dwelling-house to which the principal Act of 1920 applies, who has not at the date of the passing of the Act of 1923, let his house or part of it as a separate dwelling.

Lloyd v. *Cook* [1929] 1 K. B. 103, followed on this point.

Per Slesser L.J. In s. 12, sub-s. 2, of the Act of 1920 (supra), the word "let" applies both to the word "house" and to the words "part of a house."

APPEAL from Whitechapel County Court.

The plaintiff was the landlord and the defendant was the tenant of a dwelling-house at 19, Head Street, Commercial Road, London, E. The premises were purchased in 1904 and occupied by the owner until 1928, when they were first let. The defendant went into possession of the premises in November, 1937, when they were let to her by the plaintiff at a weekly rental of 1*l.* 8*s.* Notice to quit was given on April 27, 1939, expiring on May 6, and the plaintiff brought this action for possession and arrears of rent. The defendant claimed that the premises were subject to the provisions of the Rent Restriction Acts, and entered a counterclaim for rent overpaid to the amount of 31*l.* The rateable value of the house was at all times 26*l.*, which brought the house within the scope of the Act of 1920, but the county court judge held that as the house was not "let as a separate "dwelling" in 1920, it was not within s. 12, sub-s. 2, of the principal Act of 1920, and therefore was not a controlled house, and he gave judgment for the plaintiff.

The defendant appealed. The appeal was heard on November 21, 1939.

Bernstein for the tenant. This house is subject to control under the principal Act of 1920, s. 12, sub-s. 2, which applies the Act to "a house or part of a house let as a separate "dwelling," where the standard rent or rateable value (as here) is within the statutory limit. The county court judge was wrong in construing this provision as confined to houses let on or before July 2, 1920, the date of the passing of the Act. *Brooks* v. *Brimecome* (1) which seems to support the county court judge's decision was decided on the construction of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 16, sub-s. 1. That Act had a different object and the case is therefore distinguishable. There are no words in the Act of 1920 limiting the operation of the Act to then existing tenancies, as is the case in later Acts. For example, in s. 2, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, and in s. 2, sub-s. 2, of the Act of 1933 the point of time is strictly defined. According to *Lloyd* v. *Cook* (2) "landlord" in s. 2, sub-s. 1, of the Act of 1923 includes an owner who subsequently lets a house. The effect of that Act would be to free the house in the present case from control, but by s. 4 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, a landlord cannot claim the benefit of de-control unless he applies to the local council for registration. The plaintiff has not done so, and the house is still subject to the provisions of the Act of 1920.

Weitzman for the landlord. The county court judge was right. The policy of the Act of 1920 was to protect tenants in possession at the time the Act was passed, and its operation was so confined by the words of s. 12, sub-s. 2. The policy of the Act of 1923 was gradually to release control. A house not let until 1928 is not within the scope of the Act of 1920 and consequently is not affected by s. 2, sub-s. 1, of the Act of 1923. It would appear that the Legislature has made no provision for the owner who has let his house for the first time after the passing of the Act of 1923, and therefore this house is free from control. *Lloyd* v. *Cook* (1) is a clear authority that " landlord " includes owners who subsequently let their holdings. If so, this house is freed from control by the Act of 1923, apart from the question of registration as required by the Act of 1938. As to this, the landlord has a locus pœnitentiæ by s. 4, sub-s. 2, of the latter Act if he can give a reasonable excuse for failure to register.

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(1) [1937] 2 K. B. 675.

(2) [1929] 1 K. B. 103.

SLESSER L.J. [after stating the facts :] The first question which arises for consideration is whether the judge was right in coming to the conclusion that this house was not within the ambit of the Rent Restriction Acts. The principal Act which deals with this matter is the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. That was a consolidation of the provisions of the earlier Acts, which were in substance repealed. The Act contains in s. 12, sub-s. 2, the following definition of a dwelling-house within the meaning of the Act : " This Act shall apply to a house or part of a "house let as a separate dwelling, where either the annual "amount of the standard rent or the rateable value does not "exceed (*a*) in the metropolitan police district, including "therein the City of London, one hundred and five pounds ; "(*b*) in Scotland, ninety pounds ; and (*c*) elsewhere, seventy-"eight pounds ; and every such house or part of a "house shall be deemed to be a dwelling-house to which "this Act applies . . . ." The word " dwelling-house " is stated in s. 16, sub-s. 1, of the Act of 1933 to have the same meaning as in the principal Acts, and then follows a meaning which is different from that which is contained in the principal Acts : " . . . . that is to say, a house let as a separate "dwelling or a part of a house being a part so let." A doubt was expressed in *Brooks* v. *Brimecome* (2) about the effect of that definition in the Act of 1933 on the earlier

(1) [1929] 1 K. B. 103.

(2) [1937] 2 K. B. 675.

definition in s. 12, sub-s. 2, of the Act of 1920, but, if the matter is now to be considered, I am of the opinion that, having regard to the mischief to which the Acts are directed, s. 12, sub-s. 2, of the Act of 1920 should be read as if the word "let" governed the word "house" as well as the words "part of a house."

It would, therefore, appear that in 1920 the Act would have applied to this house if it had then been let, but the question is whether that is so in view of the fact that the house was not let until 1928. I wish to deal with this matter, first, as if there were nothing in the Act of 1923 which affected the position. I ask myself whether or not, if a house to which the Act of 1920 applied in that year because of its rateable value, was first let in 1928 at a rent which would bring it within the Act of 1920, the Act of 1920 would apply to it. In my opinion it would. I can find nothing in the Act of 1920 to limit the application of s. 12, sub-s. 2, to a house which was let as a separate dwelling at the time of the passing of the Act, namely, on July 2, 1920. There are no words of limitation providing that the sub-section shall not apply to a house which is let after that date, no such words as appear in s. 2, sub-s. 1, of the Act of 1923, and s. 2, sub-s. 2, of the Act of 1933, limiting the operation of the Act to houses let "at the time of" or "before the "passing of the Act." If there had been no legislation after 1920, I should come to the conclusion that in 1928, when the house was first let, s. 12, sub-s. 2, applied the Act of 1920 to it so that thereafter it was a house to which that Act applied.

The next question to be considered is the effect of s. 2, sub-s. 1, of the Act of 1923, remembering that, in that year, the house had not yet been let. That sub-section provides as follows: "Where the landlord of a dwelling-house to "which the principal Act applies is in possession of the whole "of the dwelling-house at the passing of this Act, or comes "into possession of the whole of the dwelling-house at any "time after the passing of this Act, then from and after the "passing of this Act, or from and after the date when the "landlord subsequently comes into possession, as the case "may be, the principal Act shall cease to apply to the "dwelling-house . . . ." It is clear that those words, read in their strict sense, give to the word "landlord" the meaning of one who is legally related to a tenant, but if a "landlord" were in possession of the whole of the dwelling-house, normally he would not have a tenant, and the result would be that the sub-section would be entirely inoperative. This problem, however, has been fully considered by this Court in *Lloyd* v. *Cook* (1), which has never been questioned as to this matter, although certain observations of the judges have been commented on. The effect of that decision is that the word "landlord" in s. 2, sub-s. 1, of the Act of 1923 does not necessarily imply the existence of a tenant; a freeholder who has never let a dwelling-house to a tenant may nevertheless be a landlord within the meaning of the section. It is thus put by Scrutton L.J., in the course of his judgment: "The "word 'landlord' must be used either in the looser meaning "of 'owner,' or in the still looser meaning of a person who "at a later stage is going to appear as a landlord contesting "with a tenant the terms of his tenancy." The other Lords Justices speak to the like effect. If one applies that test to the present case, this landlord in 1923 was a person who is now contesting in this Court with a tenant the terms of the tenancy, and, therefore, he is a landlord within the meaning of s. 2, sub-s. 1, of the Act of 1923. It follows, therefore, that in 1923 he was the landlord of a dwelling-house to which the principal Act applied. At the passing of the Act of 1923 he was in possession of the whole of the dwelling-house, and, therefore, by s. 2, sub-s. 1, of that Act the principal Act ceased to apply to the house.

Unfortunately, however, for the landlord, the matter does not rest there. There is a provision in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, s. 4, sub-s. 1, that if the landlord of a dwelling-house let as a separate dwelling immediately before the passing of that Act (not exceeding 35*l*. rateable value) claims the benefit of the Act

(1) [1929] 1 K. B. 103, 120.

of 1923, s. 2, sub-s. 1, he must apply for registration of the dwelling-house within three months. In the present case the landlord had made no such application, and he now desires to avail himself of a proviso in s. 4, sub-s. 2, of the Act of 1938, by which he can still apply for registration if he can satisfy the county court (within a year from the passing of the Act) that he had a reasonable excuse for his failure to do so. There must, therefore, be a new trial to determine (inter alia) the landlord's application under s. 4, sub-s. 2, whether or no the standard rent has been paid, and the effect of any excess payment on the counterclaim. As the case stands, the county court judge was wrong in holding that the house was not a controlled house within s. 12, sub-s. 2, of the Act of 1920. The plaintiff is a "landlord" to whom the Act of 1923 would have applied had he satisfied the provisions of s. 4 of the Act of 1938. Subject to this, the appeal will be allowed.

LUXMOORE L.J. I agree.

ATKINSON J. I agree. The interpretation which we have put on s. 12, sub-s. 2, of the Act of 1920 is implicit in the decisions in *Lloyd* v. *Cook* (1) and *Goudge* v. *Broughton*. (2)

Appeal allowed.

Solicitor for appellant: *S. Seifert.*
Solicitor for respondent: *T. V. Edwards.*

(1) [1929] 1 K. B. 103.
(2) Ibid.

F. P. F.

1939
Dec. 12.

SMITH *v.* MOSS AND ANOTHER.

Negligence—Personal injury—Motor-car collision—Injured person a passenger in car driven by her husband—Husband driving car as agent for owner—Claim of wife to recover against owner for husband's negligence.

The plaintiff, while a passenger in a motor-car owned by her mother-in-law, received personal injuries in a collision between that car and another car. The car in which the plaintiff was a passenger was being driven by her husband. The plaintiff, with her husband and his mother, had attended a party, and at the time of the accident the husband, after having conveyed his mother home, was driving the car back to his own house, attached to which was a garage of which his mother had the free use. The mother paid all the running expenses of the car, and also for the road licence and the insurance, and she allowed the husband of the plaintiff alone to drive it. It was found that the husband was alone to blame for the collision:—

Held, that at the time of the accident the husband was driving the car in the capacity of agent for his mother, and, therefore, that the plaintiff was not deprived of her right to recover damages from the mother as owner of the car by the general principle of law that one spouse cannot commit a tort on the other.

ACTION tried by Charles J. without a jury.

The plaintiff, Mrs. Ida Ethel Smith, claimed damages for injuries received by her in a collision between two motor-cars, one of which was owned and was being driven by the first-named defendant, R. F. Moss, and the other of which was owned by the second defendant, Mrs. Rosalie Smith, but was being driven by Leslie Alfred Smith, the husband of the plaintiff and the son of the second defendant.

The collision occurred on January 1, 1939. The plaintiff, with her husband and mother-in-law, had been to a party, and at the time of the accident the husband, having conveyed home his mother, was driving the car, in which was the plaintiff as a passenger, back to his own house to put it in a garage attached thereto, of which his mother had the free use. Mrs. Rosalie Smith paid all the running expenses of the car, and also for the road licence and the insurance, and Leslie Alfred Smith was the only person permitted by her to drive the car.

Edgedale for the defendant, Mrs. R. Smith. One spouse cannot commit a tort on the other, for in law they are one person: see *Phillips* v. *Barnet.* (1) A wife cannot sue her husband, and she cannot sue the person who employed her husband as driver of a car for a tort which, in law, the husband could not commit.

[CHARLES J. Does the question of agency affect the matter? Supposing a man commits a tort not as a husband but as agent for somebody else. If the reason why a wife cannot sue her husband is that in law they are one person, does the same principle apply whatever may be his capacity when he commits the tort?]

The son of the second defendant was driving the car in the capacity of husband of the plaintiff, with the licence of the mother. It is impossible to hold that he was driving the car as agent of his mother.

F. G. Paterson for the plaintiff. A wife cannot sue her husband if he beat her, but if the mother-in-law persuade the husband to beat the wife the wife can sue the mother-in-law, because the husband is merely his mother's agent for carrying out her wish. Applying that to the present case, the plaintiff can recover.

Humfrey Edmunds for the defendant Moss.

CHARLES J. [stated the facts and continued:] It is said that the plaintiff cannot recover against her mother-in-law because the accident was caused by the negligence of her husband, and a husband cannot commit a tort on his wife. Strictly, that is right, but I cannot conceive that, if a husband, while acting as agent for somebody else, commits a tort, which results in injury to the wife, the wife is deprived of her right to recover against the principal who is employing the husband as agent. To take an extreme case, suppose that the plaintiff had been in the habit of hiring a car from a garage the proprietors of which employed, among a number of other men, the plaintiff's husband as a chauffeur. Suppose, too, that on a particular day, when the plaintiff had telephoned for a

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(1) (1876) 1 Q. B. D. 436.

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SMITH
v.
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Charles J.

car, the husband should be sent out as driver of that car. If an accident happened, for which the husband was responsible, could it then be said that the plaintiff was deprived of her right to recover against the owners of the car? I do not think so, because the active operator in the tort, the husband, would have two capacities (1.) that of husband and (2.) that of agent. In the present case the husband was, at the time of the accident, acting in the capacity of agent for his mother and it was his negligence alone, I hold, which caused the accident. Therefore, the plaintiff is entitled to succeed against her mother-in-law, the second defendant. There will be judgment for the first defendant, Moss, with costs against the plaintiff.

Solicitors for plaintiff: *Darracotts.*
Solicitors for defendant Moss: *R. I. Lewis & Co.*
Solicitor for defendant Mrs. R. Smith: *Wm. Chas. Crocker.*

A. W. G.

ATTORNEY-GENERAL *v.* HANCOCK.

1939
Dec. 19.

Emergency legislation — Courts — Emergency powers — Judgment — Crown debt—Enforcement—Necessity of leave—Courts (Emergency Powers) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 1.

Sect. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1939, does not bind the Crown, and the Crown can, therefore, enforce a judgment for a Crown debt without the leave of the appropriate Court.

Special Case stated by consent for the opinion of the Court pursuant to Order xxxiv., r. 1, of the Rules of the Supreme Court.

These proceedings were begun on July 4, 1938, by a writ of subpoena, whereby the informant, the Attorney-General on behalf of His Majesty, claimed against the defendant, William Cyril Hancock, arrears of income tax under Sch. D of the Income Tax Act, 1918, in respect of his profits as a manufacturer's agent for the years ended April 5, 1937, and April 5, 1938. Appearance to the writ was filed on July 30, 1938, and an information was filed on October 27, 1938. The defendant did not plead to the information, and on November 28, 1938, judgment was signed against him for 173*l.* 11*s.* 4*d.* and 9*l.* 2*s.* 7*d.* costs. The defendant had not paid any part of the judgment. After September 3, 1939, the informant proposed to proceed to execution on, or otherwise to enforce, the judgment. The defendant contended that the informant was not entitled to do so without the leave of the appropriate court under s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1939. (1) The informant contended that that sub-section had no application to proceedings brought on behalf of His Majesty.

The question for the opinion of the Court was whether the informant was entitled to proceed to execution on or otherwise to enforce the judgment without obtaining the leave of the appropriate court.

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(1) By Courts (Emergency "Powers) Act, 1939, s. 1, sub-s. 1: "Subject to the provisions of this "section, a person shall not be "entitled, except with the leave "of the appropriate court, to "proceed to execution on, or "otherwise to the enforcement of, "any judgment or order of any "court (whether given or made "before or after the commence-"ment of this Act) for the pay-"ment or recovery of a sum of "money . . . ."

Sir Donald Somervell A.-G., *Reginald Hills* and *Valentine Holmes* for the Crown. The conditions under which statutes bind the Crown are set out in Robertson's Proceedings by and against the Crown, p. 567. It is true that in *Attorney-General of the Duchy of Lancaster* v. *Moresby* (1) Rowlatt J. held that the Courts (Emergency Powers) Act, 1917, bound the Crown as an Act "for the suppression of wrong." That expression is apparently based on Maxwell on Interpretation of Statutes, 8th ed., p. 120, where the only authorities cited are very old, such as the *Magdalen* [*sic*] *College Case.* (2) The principle has fallen into desuetude. In modern times, chronologically the first group of statutes affecting debtors, and partly for their benefit, is the Bankruptcy Acts. In *Ex parte Postmaster-General. In re Bonham* (3) it was held that though the Crown is named in some sections of the Bankruptcy Act, 1869, it is not bound by the rest of the Act. Similarly, in *In re Henley & Co.* (4) the Crown was held not to be bound by the Companies Act, 1862. In the *Magdalen College Case* (2) an ecclesiastical corporation was restrained by statute from alienating its lands. It sought to get over that prohibition by alienating to the Queen. The decision that the Act being for the benefit of religion bound the Crown was not necessary, there being another and simpler ground that, since the college could not convey at all, it could not convey to the Crown. In spite of the express language of the Debtors Act, 1869, that "no person shall be arrested or imprisoned "for making default in payment of a sum of money" it has been held that it does not apply to the Crown: *Attorney-General* v. *Edmunds* (5); *In re Arthur Heavens Smith.* (6) It is only in extreme cases nowadays that the Crown resorts to the right to take a man's body in execution, but it is occasionally exercised. The modern Companies Acts, however, do apply to the Crown: *In re Henley & Co.* (1) was distinguished in *Food Controller* v. *Cork.* (2) The Crown is not bound by the Rent Restriction Acts: *Clark* v. *Downes* (3), *Wirral Estates Ld.* v. *Shaw.* (4) In *Irish Land Commission* v. *O'Neill* (5) the Courts (Emergency Powers) Act, 1914, was treated as not binding on the Crown. In *Attorney-General of the Duchy of Lancaster* v. *Moresby* (6) Rowlatt J. was dealing solely with the Courts (Emergency Powers) Act, 1917, s. 1, which dealt with a different matter—the suspension of contracts. The present Act is more like that of 1914, but on any view it deals with a different subject-matter from that before Rowlatt J. The Act of 1917 dealt with cases where the subject suffered from an irruption by the Crown, and Rowlatt J.'s decision is merely that the Crown, having irrupted, cannot impose on the subject a hardship caused by its own irruption. The right principle now is that the Crown is not bound by a statute without express words or necessary implication. The best argument on which to try to support Rowlatt J.'s judgment in *Attorney-General of the Duchy of Lancaster* v. *Moresby* (6) is that by necessary implication the Crown must be assumed not to intend to avail itself of its own act of interference.

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(1) [1919] W. N. 69.
(2) (1616) 11 Rep. 66*b*.
(3) (1879) 10 Ch. D. 595.
(4) (1878) 9 Ch. D. 469.
(5) (1870) 22 L. T. 667.
(6) (1876) 2 Ex. D. 47.

Harold Murphy K.C. and *Bowe* for the defendant. There is no escape from the dilemma that either Rowlatt J. in *Attorney-General of the Duchy of Lancaster* v. *Moresby* (6) was wrong, or the defendant in this case is right, for there is no material distinction between the two statutes involved. This is, if anything, the clearer case, for the word used in the Act of 1939 is "person," while in the earlier Act it was "party." In the *Magdalen College Case* (7) it was held that without question the Queen was a "person." Rowlatt J.'s decision has stood unchallenged for twenty years. [*Sir Donald Somervell A.-G.* The Courts (Emergency Powers) Act, 1917, came to an end shortly afterwards.] Even so, if that decision

(1) 9 Ch. D. 469.
(2) [1923] A. C. 647.
(3) (1931) 145 L. T. 20.
(4) [1932] 2 K. B. 247.
(5) [1915] 2 I. R. 66.
(6) [1919] W. N. 69.
(7) 11 Rep. 66*b*, 70*a*.

did not express the intention of the Legislature it could have been put right in the new Act, but the Legislature has been content to leave it. It is clear that Rowlatt J. considered that he had to decide this very point, while in *Irish Land Commission* v. *O'Neill* (1) the point was not present to the mind of the Court, it being apparently taken for granted that, if the debt were a Crown debt, the Crown was not bound. The Courts (Emergency Powers) Act, 1939, is pre-eminently an Act "for the suppression of wrong," its whole purpose being to prevent injustice and hardship which might arise if parties were left to the enforcement of pre-war rights notwithstanding new circumstances arising out of the war. There is no ground for saying that the old principle in this regard has fallen into desuetude. Another point of view is that there is no prerogative here at all, since the Income Tax Acts have provided a complete statutory code for the enforcement (and in certain cases the mitigation) of obligations and penalties arising out of income tax. He cited *Baron de Bode* v. *The Queen.* (2)

Sir Donald Somervell A.-G. in reply. With regard to the suggestion that the old principle had fallen into desuetude, doubtless if an exactly similar case arose the old decisions would be followed, but till that happens, they must be read in the light of later decisions. If the Income Tax Acts form a complete code, that code would not be affected by general provisions in an Act passed for other purposes, but only by express words. The question in *Baron de Bode* v. *The Queen* (2) was what Court had jurisdiction. As to "suppression of "wrong," there are four groups of statutes for the prevention of wrong or the protection of debtors, regarding all of which it has been either held or assumed that general Acts do not bind the Crown, namely, the Bankruptcy Acts, the Companies Acts, the Debtors Act, and the Rent Restriction Acts. The same principle applies to the Courts (Emergency Powers) Act.

WROTTESLEY J. In this special case the Attorney-General, on behalf of the Crown, propounds the question whether the

(1) [1915] 2 I. R. 66.

(2) (1848) 13 Q. B. 364.

Crown may proceed to execute a judgment properly obtained against a subject in accordance with the powers vested in the Crown, or whether, before the Crown can take that step, it is necessary to obtain the leave of the appropriate court under s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1939. The defendant contends that, before the execution can be proceeded with, he must be given the opportunity of putting his case and resisting the Crown, as this is a case of the kind to which the Courts (Emergency Powers) Act, 1939, applies. The contention of the Crown is that the Courts (Emergency Powers) Act does not bind the Crown, in accordance with the old rule under which the Crown is not bound by an Act of Parliament unless it is specially named in it or brought within it by necessary implication.

It is clear that the subject of this judgment is, as appears from s. 169 of the Income Tax Act, 1918, a debt due to the Crown, and one, therefore, for which the Crown is entitled to obtain judgment and, normally, to enforce that judgment. The rule dealing with the effect of Acts of Parliament on the Crown is a very old one. In Maxwell on the Interpretation of Statutes, 8th ed., p. 120, it is described as follows: "It has "been said that the law is prima facie presumed to be made "for subjects only. At all events, the Crown is not reached "except by express words or by necessary implication in any "case where it would be ousted of an existing prerogative or "interest. It is presumed that the Legislature does not "intend to deprive the Crown of any prerogative, right or "property, unless it expresses its intention to do so in explicit "terms, or makes the inference irresistible." In Craies on Statute Law, 4th ed., p. 361, a passage dealing with this matter from Plowden is quoted as follows: "The reason of "the rule is thus put by Plowden 240: 'Because it is not an " 'Act without the King's assent, and it is to be intended that " 'when the King gives his assent he does not mean to " 'prejudice himself or to bar himself of his liberty and his " 'privilege, but he assents that it shall be a law among his " 'subjects.'" That would, perhaps, nowadays be regarded as rather an over-statement of the position of the Crown with regard to Acts of Parliament, and the true rule is probably, as has been put in argument, that the Crown often assents to legislation for itself and its subjects, but an Act does not apply to the Crown unless the Crown is specially named in it. It is only a short step from that proposition to the further one that the Crown is again to be regarded as being affected by an Act of Parliament when this is shown by necessary implication from the language of the statute. That being the rule, the question has come before the Courts for debate and decision from time to time in the last hundred years.

My attention has been drawn to a number of cases where the Courts have had occasion to deal with the rule. In *Ex parte Postmaster-General. In re Bonham* (1) the question was whether the provisions of the Bankruptcy Act, 1869, applied to the Crown. In some sections of that Act the Crown was actually named and in others it was not. The question was whether the filing of a liquidation petition and the appointment of a receiver by the Court would affect the rights of the Crown against the person who had filed that petition, or in any way reduce or mitigate the rights of the Crown, and Sir George Jessel M.R. said: "The first point to "be considered is what is the general law on the subject of the "prerogative of the Crown. Now on that I think there is no "dispute whatever. The general rule, as expressed in Bacon's "Abridgment (7th ed., p. 462), is, 'that where an Act of " 'Parliament is made for the public good, the advancement of " 'religion and justice, and to prevent injury and wrong, the " 'King shall be bound by such Act, though not particularly " 'named therein; but where a statute is general, and thereby " 'any prerogative, right, title, or interest is devested or taken " 'from the King, in such case the King shall not be bound, " 'unless the statute is made by express terms to extend to " 'him.' " The Court went on to hold that the Crown was not bound by the particular section which there came under discussion because it was not specially named and because the result of treating that Act as binding on the Crown would have been that the Crown would have been devested of some prerogative, right, title or interest.

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(1) 10 Ch. D. 595, 600.

The next case to which my attention was drawn was *In re Henley & Co.* (1), where, under the Companies Act, 1862, a similar question arose on a winding-up. James L.J., who was presiding in the Court of Appeal, said (2): "It appears "to me clear on every principle that the Crown is not bound "by the Companies Act, 1862, not being specially mentioned "in it. The Crown is not debarred, in respect of any sum of "money due to it,"—that is precisely the case here—"from "taking proceedings against the property of the debtor; and "by the Income Tax Act the right is given to the Crown to "distrain upon any of the debtor's chattels for the arrears "of the tax. Independently of that Act, it is a debt due "from the person in possession of the property in respect "of which it is claimed. The company is in possession of "the property; they are the tenants, and are liable to pay "the tax. Therefore there is nothing to prevent the Crown "from suing the company or distraining their chattels, not "only on the property, but anywhere else. There being this "right, the Crown says that it does not wish to exercise its "power of distress, but instead of that, asks to be paid in "priority to the other creditors; and the liquidator, on "behalf of the company, is ready to admit that right. That "being so, it being clearly a debt due to the Crown, and a "debt in respect of which the property of the company might "be taken, I think it is right and proper that the liquidator, "as an officer of the Court, should pay the debt without "allowing the distress to be made." With that opinion of James L.J., Brett L.J. and Cotton L.J. concurred. It is true that in that case there arose also a question of priority which does not arise in the present matter.

Then came *Attorney-General* v. *Edmunds.* (3) That dealt with the Debtors Act, 1869, which enacted that, with certain exceptions, "no person shall after the commencement of "this Act, be arrested or imprisoned for making default in

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(1) 9 Ch. D. 469.
(2) Ibid. 481.
(3) 22 L. T. 667.

"payment of a sum of money." Down to that date, as most of us are aware, debtors could be imprisoned for making default in the payment of a sum of money. The case was decided before Willes J., who, in the course of the argument, "intimated that the Crown was not bound, unless named or "impliedly referred to. He would, however, consider the "question before he gave judgment." Then he came to the other question whether the Crown ought not to have taken some step before proceeding to take process against the debtor with a view to arresting him. It was a point that struck the learned judge in the course of the argument, but nevertheless when he came to give judgment he said that " he thought "it was not necessary to go through the form of an inquisition "as in the case of an extent. On the main question he had "taken time to consider the point raised, not because he had "any doubt on the general principle as to the right of the "Crown, but whether the case might come within any exception "to the general rule. His opinion was, that the case did "not come within the Act of Parliament abolishing imprison-"ment for debt. The general principle was that the Crown "was not affected except by express enactment, or by neces-"sary implication." Nobody would deny that the abolition of imprisonment for debt would be regarded as being a great step forward against anything in the shape of oppression, and yet the Court was clearly of opinion that, having regard to the form of the Act and the omission of any express terms or necessary implication affecting the Crown, the Crown preserved its right to imprison its debtors for debt.

The next case was *In re Arthur Heavens Smith.* (1) That was a curious case because it appeared that the prisoner had been an appellant in an appeal to the House of Lords, and had, in conformity with the practice in those appeals, entered into a recognizance to the Crown for the payment, not of the Crown's costs but of the respondent's costs of the appeal if he (the appellant) were unsuccessful. The appellant lost his appeal, and failed to pay the respondent's costs. His recognizance was estreated, he was arrested under process, a

(1) 2 Ex. D. 47, 48.

writ of habeas corpus had been obtained, and this was the return to the writ. It was suggested by Mr. Channell, on behalf of the prisoner, that he should be discharged, because the debt, though in form a Crown debt, was not so in substance, and, therefore, that the power to imprison in respect of it had been taken away by the Debtors Act, 1869. Lord Coleridge said: "I think this is clearly a Crown debt in "law, and that consequently the Debtors Act, 1869, does "not apply, and the power of imprisonment continues." With that decision Pollock B. concurred.

My attention was also called to *Wirral Estates, Ld.* v. *Shaw.* (1) The Acts there under discussion were the Rent Restrictions Acts of 1920 to 1923. Huts which had been erected by the Crown under their powers during the war had been let out to tenants, and the question was whether those tenants of the Crown were protected by the Acts, the Crown having in the meantime sold the land and desiring to get vacant possession. It was held that those Acts did not affect premises owned by the Crown.

We have, therefore, a series of decisions on Acts which are clearly for the public benefit, in one after another of which we find the Courts deciding that a statute is to be construed as not affecting the Crown's prerogative, rights and interests unless there are clear words in the statute necessitating a contrary implication.

With the outbreak of the last war came the Courts (Emergency Powers) Act, 1914, for this is not the first occasion on which Parliament has found it necessary to pass an Act along the lines of the present Courts (Emergency Powers) Act. Sect. 1 of the Courts (Emergency Powers) Act, 1914, begins with the words: "From and after the passing of this "Act no person shall . . . ." Pausing there, Mr. Murphy said, and everybody, I think, must agree with him, that the word " person " clearly can include the Crown, and it is for that reason that it has been necessary from time to time for the Courts to remind themselves of the rule with which I am dealing. The Act of 1914 provided: " From and after

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(1) [1932] 2 K. B. 247.

"the passing of this Act no person shall—(*a*) proceed to execution on, or otherwise to the enforcement of, any judgment "or order of any court (whether entered or made before or "after the passing of this Act)"—I am passing over words— "or (*b*) levy any distress, take, resume, or enter into possession "of any property," and so forth, "except after such application to such court and such notice as may be provided for "by rules or directions under this Act." That Act was passed to deal with a situation not unlike that in which we find ourselves to-day. The first thing I note about it is that never at any time has any person, so far as I am informed, suggested that the Crown was bound by that Act when recovering taxes from its subjects. Not that the matter did not fall to be discussed. In November, 1914, in *Irish Land Commission* v. *O'Neill* (1), an Irish farmer raised the question with regard to a payment which he was liable to make to the Irish Land Commission in respect of a farm which I suppose he had purchased under one of the Irish Land Acts. The Court, consisting of three judges of the King's Bench Division in Ireland, Madden, Boyd and Kenny JJ., had to decide whether, before that debt could be enforced, there must be an application under the Courts (Emergency Powers) Act, 1914. The ground on which the matter was argued was not that the Courts (Emergency Powers) Act, 1914, applied in the case of a debt due to the Crown, but that the particular Act under which the payment in question was made did not make it a debt due to the Crown. It is clear that both the Court and the counsel in that case assumed that, if the amount claimed were a debt due to the Crown, or were a payment which the Crown was entitled to receive, the Crown, not being named, either expressly or by necessary implication in the Act, could proceed to enforce the payment without first applying for leave. It is not unimportant that no person has until to-day come forward, either in respect of the Courts (Emergency Powers) Act, 1914, during its currency, or under the present Act, to claim that the Crown is, like a subject, unable to enforce its judgment until it has obtained leave.

(1) [1915] 2 I. R. 66.

That, however, is not the only occasion on which a Courts (Emergency Powers) Act has been discussed in the Courts with reference to the Crown. In *Attorney-General of the Duchy of Lancaster* v. *Moresby* (1) the Duchy of Lancaster had leased to certain persons premises which were taken from those persons by the Crown under one or other of its powers in the last war. The Duchy of Lancaster, although, presumably, they knew that their tenants had no beneficial use of the premises and had been unable to recover compensation, chose to press their claim for rent. By the time the case came on for trial a substantial payment of compensation had been made to the tenants who had paid their rent and the real dispute was therefore merely as to who should pay the costs. In delivering judgment, Rowlatt J., after commenting most unfavourably on the attitude taken up by the Duchy, said that he had to consider the substance of the counterclaim which had been filed, "and he had therefore to consider whether the Courts "(Emergency Powers) Act, 1917, bound the Crown. That "statute dealt with cases where the circumstances showed "great hardship, and where the normal conduct of affairs "was rendered impossible by the action of the Government. "He thought that this Act belonged to the class of statutes "which bound the Crown as being one for the suppression of "wrong. See Craies' Statute Law, 4th ed., p. 361. In his "opinion it was impossible to divide up the Crown into "departments. He would make an order relieving the "defendants, so long as the premises were in the occupation "of the Office of Works, from paying rent in excess of the "payments made to them by the Losses Commission." The Courts (Emergency Powers) Act, 1917, empowered the Courts to give appropriate relief in the case of contracts which owing to restrictions or directions given under the Defence of the Realm Act or Regulations, or to the fact that the Crown had seized, or was using, premises, could not be enforced without serious hardship. In *Attorney-General of the Duchy of Lancaster* v. *Moresby* (1), therefore, Rowlatt J. decided that

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(1) [1919] W. N. 69.

s. 1, sub-s. 2, of that Act applied to the Crown in the sense that it applied to a contract to which the Crown was a party, but no one has ever decided that the Courts (Emergency Powers) Act, 1914, affected the Crown so as in any way to diminish its right to recover taxes. On that ground alone, the decision of Rowlatt J. in *Attorney-General of the Duchy of Lancaster* v. *Moresby* (1) is distinguishable from the present case.

There are other difficulties in *Attorney-General of the Duchy of Lancaster* v. *Moresby* (1) To begin with, it did not deal with a debt due to the Crown at all, but with costs. I cannot say that I agree with it if it purports to decide, quite apart from difficulties of procedure, that a subject could rely upon s. 1 of the Act of 1917 to suspend or annul a contract with the Crown. The present case, however, is not one of a contract with the Crown. It is a case of a debt due to the Crown, not under contract but by way of tax.

Looking at the decisions to which I have referred under the Debtors Act, 1869, the Bankruptcy Acts, and the winding-up provisions in the original Companies Act—none of them very far distant from the subject-matter which I have to deal with—I feel bound to say that the Courts (Emergency Powers) Act, 1939, if it applied to the Crown, would clearly diminish the Crown's property, interest, prerogative or rights, and it is not necessary for this purpose for me to say which of those rights would be affected. Very likely all of them would be. It follows that the Crown is not affected by the Courts (Emergency Powers) Act, 1939, not being named expressly or by implication.

My attention has also been called to the *Magdalen College Case*. (2) Many reasons were given in this case for the decision in that case, which was that the Master and Fellows of Magdalene College, Cambridge, had no right to devest themselves of certain property by conveying it to Queen Elizabeth, not for the Crown, but for some other purpose. It is apparent that the form of a conveyance to the Crown was resorted to in order to evade the Act which forbade ecclesiastical corporations to devest themselves of their

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(1) [1919] W. N. 69.

(2) 11 Rep. 66*b*.

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property. Many reasons were given by the Chief Justice for holding that that disposal of the land was void, but it is clear that one alone would have been sufficient, namely, the simple one that the Act of Parliament forbade the Master and Fellows of the College to devest themselves of their property, and, therefore, they could not do so in favour of the Crown.

But, however that may be, the principle has been discussed and applied, or not applied, in a number of decisions during the last hundred years and the rule is now well laid down and clear that if an Act of Parliament would otherwise devest the Crown of its property, rights, interests or prerogative, it is not to be construed as applying to the Crown unless the Crown is mentioned either expressly or by necessary implication. In the statute under consideration here there are no special words naming the Crown and it is also clear that there is no necessary implication to be drawn from the words of the statute to involve the Crown. That being so, I declare that the informant may proceed to execution upon or otherwise to enforce the judgment without the leave of the Court.

Judgment for Informant.

Solicitors for Informant: *Solicitor of Inland Revenue.*

Solicitors for defendant: *James Turner & Son & Whitehouse.*

J. W. H.

C. A.
1939
Dec. 5, 6.

ENGLISH AND SCOTTISH CO-OPERATIVE PROPERTIES MORTGAGE AND INVESTMENT SOCIETY, LIMITED *v.* ODHAMS PRESS, LIMITED.

Defamation—Libel—Return of profits by society incorporated under Industrial and Provident Societies Act—Police court summons against society for making false return—Newspaper report with large-type heading " False profit return charge "—Return inaccurate but without fraud or improper dealing—Newspaper report, whether defamatory.

A society registered under the Industrial and Provident Societies Acts, 1893 to 1928, made to the registrar of friendly societies an annual return of profits for the year 1936, which showed a profit of 4833*l.* and stated that that return was made only after including 11,131*l.* proceeds of sale of a ground rent. The official auditor was of opinion that the latter sum was not a realized profit and should not have been included in the return. The registrar took out a summons in the police court against the society for wrongfully making a return of its profits for that year which was false. A newspaper published a report of these matters under the heading in heavy italic type " False Profit " Return Charge Against Society." The society brought an action for libel against the printers, proprietors and publishers of the newspaper, alleging that by the words of the report the defendants meant that the plaintiffs had deliberately falsified their accounts and had published a return of their profits which they knew to be wrong with a view to deceiving their shareholders and the public. The defendants said that the words of the report did not bear the meaning alleged or any defamatory meaning and that in their natural and ordinary meaning they were true. The trial judge left it to the jury to say what meaning the words of the report would reasonably be understood to bear, and in his summing up he used language which might have suggested that in the absence of proof of special damage the damages need not be more than nominal. The jury found that the words of the report bore the meaning attributed to them by the plaintiffs, but awarded the plaintiffs only one farthing as damages :—

Held, by the Court of Appeal, that, as the word " false " was ambiguous and might mean either incorrect or fraudulent, the judge had rightly left it to the jury to say which meaning it bore in the report, and that there was evidence to support the finding that it there bore the latter meaning ; but that the judge had wrongly directed the jury in regard to damages, that the nominal damages were inadequate, and that there should be a new trial of the action limited to the assessment of damages only.

English and Scottish Co-operative Properties Mortgage and Investment Society, Ld. *v.* Odhams Press, Ld.

Appeal and Cross-Appeal from verdict and judgment at trial before Humphreys J. and a special jury.

The English and Scottish Co-operative Properties Mortgage and Investment Society, Ld. (hereinafter called the plaintiffs), were a society incorporated in 1933 under the Industrial and Provident Societies Acts, 1893 to 1928.

The plaintiffs, pursuant to the Industrial and Provident Societies Act, 1893, s. 14, made an annual return of profits for the year 1936 to the Registrar of Friendly Societies, which showed a profit of 4833*l.*, and stated that that return was made only after including 11,131*l.* net proceeds from the sale of a ground rent of the plaintiffs' properties.

In their report on that return the official auditors gave it as their opinion that the said sum arising from the sale of the ground rent was not a realized profit; but an eminent accountant and a senior counsel, who had been consulted by the plaintiffs were of a different opinion.

On December 8, 1937, at the instance of the Registrar of Friendly Societies, a summons under the Industrial and Provident Societies (Amendment) Act, 1913, s. 10 (*c*) (1), was issued from the police court at Marlborough Street, London, against the plaintiffs for making a return of profits which was false. A similar summons was also issued against Mr. J. Wolstenholme, who was managing director of the plaintiffs' society, but that was not proceeded with.

The proceedings in the police court extended to five days with intervals of time between them, and eventually, after the present action had been brought, the magistrate decided that technically the proceeds of sale of the ground rent were not in fact a profit, and that in that sense the return was false, and he fined the plaintiffs 5*l.* During the proceedings it was stated by counsel for the prosecution and also by the magistrate that there was no suggestion of fraud, improper dealing, or any other moral guilt on the part of the society.

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(1) Industrial and Provident Societies (Amendment) Act, 1913 (3 & 4 Geo. 5, c. 31), s. 10: "The following provisions shall "be substituted for s. 62 of the "principal Act:—'It shall be an "'offence under this Act if— "'. . . . (*c*) A registered society "'or an officer or member thereof, "'or any other person, makes a "'return, or wilfully furnishes "'information in any respect "'false or insufficient; . . . .'"

For some time before the next-mentioned date the Daily Herald newspaper had published articles relating to the condition and proceedings of societies incorporated under the above-mentioned Acts.

In the issue of that newspaper of December 10, 1937, there appeared an article headed with the words in heavy type "Friendly Society Heads May Be Sued," which stated that a case of supreme interest to all investors in mortgage and property-holding friendly societies of a certain category was likely to come before a London court; that in consequence of collaboration between the Chief Registrar of Friendly Societies and another authority proceedings were contemplated; that such action, if taken, would be against the directors of a registered friendly society with headquarters in London; that among the directors were men of title and eminent public service; that the action arose out of alleged contravention of the Special Act governing friendly societies; and that inquiries in progress covered the activities not only of this one particular society but of others in which the trading methods were of a rather similar character.

In the issue of the said newspaper of December 23, 1939, an article appeared in the words and figures following:—

"*False Profit*

"*Return Charge*

"*Against Society.*

"Summonses for making a return wrongfully stating the "profit for 1936 have been issued against the English and "Scottish Co-operative Property Mortgage and Investment "Society, Ld., and the managing director, Mr. J. Wolstenholme.

"This action has been taken by the Registrar of Friendly "Societies. The case is put down for hearing at Marlborough-"street Police Court on December 30.

"*Annual Returns.*

"Annual returns for 1936 made to the Registrar of Friendly "Societies showed a profit of 4833*l.*, but this was made, as "was stated in the return, only after including 11,131*l*. net "proceeds from the sale of a ground-rent of one of the society's "properties and 7768*l*. surplus of realisation on other properties.

"In their report on the 1936 accounts the auditors drew "attention to the sale of the ground-rent and gave their "opinion that this amount was not a realised profit.

"*The Directors.*

"The directors of the society at the time of the last annual "report were Brig.-Gen. Sir William Horwood, G.B.E., K.C.B., "D.S.O. (chairman), a former Commissioner of the Metropolitan "Police; Sir Gervais Rentoul, K.C., a London magistrate; "Lord Massereene and Ferrard, D.S.O.; and Mr. J. Wolsten-"holme (managing director).

"Sir Gervais Rentoul told the 'Daily Herald' last night: " 'The summonses are in connection with the balance-sheet " 'issued last year when I was a director.

" 'Viscount Massereene resigned two or three months ago " 'because he was ill. Sir William Horwood and Mr. " 'Wolstenholme are still directors.' "

The heading of that article, being the first three short lines thereof, was printed in heavy italic type, the parts relating to the annual returns and the directors in type darker than the ordinary type, and the rest in ordinary type.

On February 16, 1938, the plaintiffs brought the present action against Odhams Press, Ld., the printers of the said newspaper, and the Daily Herald (1929), Ld., the proprietors and publishers thereof (all hereinafter called the defendants), alleging in their statement of claim (inter alia) (para. 3) that the defendants had in October, 1937, printed and published in the Daily Herald articles stating that many of such societies were attracting investors although they were insolvent, were publishing misleading and inaccurate accounts, and were obtaining moneys for investment by touting and by falsely representing to the public their financial position; (para. 4) that in the issue of the said newspaper of December 23, 1937, the defendants falsely and maliciously printed and published of the plaintiffs, and of them in their way of business, the words of the article contained in that issue as above set out; (para. 5) that by the said words the defendants meant and were understood to mean that the plaintiffs had deliberately falsified their accounts and had published a return of annual profits which they knew to be wrong and had been advised by their auditors to be wrong, and that they had done so with a view to deceiving their shareholders and bondholders and the general public as to their true financial position, and that they were insolvent or in an unstable financial position, and that they were a society which investors should avoid, and that they carried on their business and attracted investors by dishonest methods, and (para. 6) that the plaintiffs had been injured in their character, credit and reputation and in the way of their business; and claiming damages.

The defendants in their defence said (para. 3) that the matters complained of in para. 3 of the statement of claim were irrelevant, and that every allegation therein was denied; (para. 4) that the defendants denied that they printed and published the words complained of in para. 4 of the statement of claim of the plaintiffs in the way of their business; (para. 5) that the defendants did not mean nor were they understood to mean by the said words any of the meanings alleged, and that the words did not bear and were not capable of bearing, any of such meanings or any other defamatory or actionable meaning; (para. 6) that the words without the said alleged meanings were no libel; (para. 7) that the said words formed part of a fair and accurate report in the said newspaper of proceedings publicly heard before a court exercising judicial authority, which report was published contemporaneously with such proceedings in good faith for the information of the public and without any malice towards the plaintiffs; (para. 8) that the words in their natural and ordinary meaning and without any of the said alleged meanings were true in substance and in fact; (para. 9) that the words in so far as they consisted of statements of fact were true in substance and in so far as they consisted of comment were fair comment on matters of public interest published in good faith and without malice; (para. 10) that the words were not actionable at the suit of the plaintiffs who were not a trading corporation and did not carry on business, or alternatively were not actionable without proof of special damage of which no allegation was made in the statement of claim; and (para. 11) that the plaintiffs had not been injured.

On July 10 and 11 the trial of the action took place. Besides the article complained of, the articles that had appeared in the earlier issues of the Daily Herald were admitted in evidence, and Mr. S. R. Dean, the chairman of directors of the plaintiff company, as a witness on their behalf, expressed his view of the alleged libellous article. Humphreys J. ruled that the words of the article were capable of bearing a libellous meaning and left the case to the jury. In his summing up the learned judge, after drawing the attention of the jury to the admitted facts and the evidence, including the said earlier articles and the evidence of Mr. Dean, asked them to say whether the article complained of was reasonably capable of bearing any of the meanings attributed to them by the statement of claim; and, as to damages, he said that it was open to the plaintiffs to plead special damage, that nothing of the sort was suggested by them, that there was no evidence that the plaintiffs had lost any business, but that if a person published a defamatory libel of another the law always assumed that it might have caused him some damage. The parts of the summing up which were specially considered on the appeal are set out below in the judgment of Slesser L.J.

The jury found that the words of the article complained of bore the meanings attributed to them by the plaintiffs; but they awarded the plaintiffs only one farthing damages, and judgment was entered for them for that amount.

The plaintiffs appealed on the ground that the damages were insufficient, and that the judge had misdirected the jury on the question of damages.

The defendants cross-appealed on the grounds that the judge misdirected himself in allowing the case to go to the jury; that the action was not maintainable, and the judge ought so to have ruled and entered judgment for the defendants; and that there was no evidence that the words bore any of the meanings alleged by the plaintiffs.

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Valentine Holmes and *Hugh Holmes* for the plaintiffs, appellants. The appeal of the plaintiffs should be allowed. The verdict of the jury for one farthing damages was clearly wrong and was the result of a misdirection by the judge as to the measure of damages in an action for libel. As the jury found that the words complained of had the meaning set out in the innuendo they must, if they had been properly directed in the summing up, have found damages greater than a farthing. Further, in finding only one farthing damages they must have taken into account matters which they ought not to have taken into account, or must have omitted to take into account matters which they ought to have taken into account. The judge directed the jury that as the plaintiffs did not plead special damage they were not entitled to substantial damages. It was held in *Ratcliffe* v. *Evans* (1) that in an action for words not actionable per se, but constituting an untrue statement maliciously published about the plaintiff's business, which statement is intended or reasonably likely to produce, and in the ordinary course of things does produce, a general loss of business as distinct from the loss of particular known customers, evidence of such general loss of business is admissible and sufficient to support the action. To call a man a dishonest trader is libellous, and the jury ought to have given the plaintiffs substantial damages without proof of special damage. A plaintiff can give evidence of general damage although he has not given particulars of special damage. It is stated in Fraser's Libel and Slander, 6th ed., p. 34, that "For every libel an action for damages will "lie even though no special damage can be proved." "The "law assumes that of necessity the person defamed has suffered "damage, and therefore he is entitled to maintain an action, "even though he does not and cannot prove that he has "suffered any definite temporal loss, or actual damage, or, as "it is technically called, special damage." It is stated in Gatley on Libel and Slander, 2nd ed., pp. 2, 3, that in cases of libel or slander actionable per se, the plaintiff need not prove technical damage, for as Bowen L.J. said in *Ratcliffe* v. *Evans* (1), "the law presumes that some damage "will flow in the ordinary course of things from the mere "invasion of the plaintiff's rights." It was held in *South Hetton Coal Co.* v. *North Eastern News Association, Ld.* (2) that an action for libel will lie at the suit of an incorporated trading company in respect of a libel calculated to injure its reputation in the way of its business, without proof of special damage.

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(1) [1892] 2 Q. B. 524.

St. John Field K.C. and *C. N. Shawcross* for the respondent. The cross-appeal should be allowed. The words of the article complained of should be construed according to their natural and ordinary meaning as English words: see *Capital and Counties Bank* v. *Henty* (3); *Nevill* v. *Fine Art Insurance Co.* (4); *Ware and De Freville, Ld.* v. *Motor Trade Association* (5); and *Sutherland* v. *Stopes.* (6) So construed this article was no libel, being in all respects true, accurate and free from malice. In saying that the return made by the plaintiffs was "false" the article follows the language of the summons, and it uses that word in its primary and ordinary sense as meaning merely inaccurate, as in fact the return admittedly was. If the word "false" as used in the article is ambiguous it cannot be assumed in the absence of evidence that the public would understand it in its less ordinary sense rather than in its more ordinary sense: see per Lord Watson in *Capital and Counties Bank* v. *Henty.* (3) The words are not capable of the innuendo put upon them by the plaintiffs. If they are susceptible of that innuendo the plaintiffs must bring evidence to prove the innuendo. In *Capital and Counties Bank* v. *Henty* (3) it was held that the inference suggested by the innuendo was not that which reasonable persons would draw, and that the onus lay upon the plaintiffs of showing that the circular there complained of had a libellous tendency. Here, the plaintiffs have brought no evidence to show that the word "false" in the article bears the secondary meaning of fraudulent attributed to it

(1) [1892] 2 Q. B. 524, 528.
(2) [1894] 1 Q. B. 133.
(3) (1882) 7 App. Cas. 741.
(4) [1897] A. C. 68.
(5) [1921] 3 K. B. 40.
(6) [1925] A. C. 47.

by the innuendo. The headlines are part of the article and cannot be separated from it, and as the article as a whole is not libellous neither is the headline. The plaintiffs were not entitled, with a view to explaining the article complained of, to put in evidence the articles which had appeared in earlier issues of the newspaper: see Gatley on Libel and Slander, 3rd ed., p. 619; and the judge should not have allowed the jury to look at these articles. Even if the article, in stating that the return was false, bore the meaning attributed to it by the innuendo, and meant that the return was calculated to mislead, it was not actionable because it was justified. The statute requires that an industrial or provident society shall make an annual return of its profits. The plaintiffs must have known without doubt that the proceeds of sale of a ground rent were not profits, and their inclusion of them in the return implied mens rea on their part. The question is not whether these proceeds of sale were a capital profit or an income profit, but whether they were a profit at all, and the only answer is that they were not a profit. This case is unlike any previous reported libel case, since every word in the article complained of is admittedly true, and the question is whether in these circumstances the article can be libellous. There was thus no case to go to the jury, and the judge ought so to have held. The plaintiffs' appeal should be dismissed. There was no misdirection by the learned judge in regard to damages. He rightly directed the jury that, as there was no evidence to show that the publication of the article had occasioned the plaintiffs any loss of business, the damages need not be more than nominal. If the Court should order a new trial, that should extend to the whole case and should not be limited to the issue of the amount of damages.

SLESSER L.J. This is an action for defamation brought by a society registered under the Industrial and Provident Societies Acts against the printers and proprietors and publishers of a daily newspaper called the Daily Herald. The article in that paper which is now complained of was published in the issue of Thursday, December 23, 1937. It was printed in various kinds of type usual now in newspapers, and more particularly in those making a popular appeal. At the top of the statement are these words in italics in large print: " False Profit Return "Charge Against Society." To those not familiar with reading newspapers it may be a little difficult, in the absence of all the verbs, to give any sense to those words: but we have almost all, I think, become familiarized with the modern methods of expression used by newspapers in their headlines; and those words, I think, would convey to an ordinary man of reasonable intelligence the meaning that against the society there had been, or there was about to be made a charge of submitting a return which stated a false profit. I think that is a fair paraphrase of those somewhat curious words.

Then follow words which, for the most part, are themselves unobjectionable, and, it is conceded, in their natural meaning, an accurate statement of facts. " Summonses for making a "return wrongfully stating the profit for 1936 have been issued "against " the defendant society "and the managing director, "Mr. J. Wolstenholme. This action has been taken by the "Registrar of Friendly Societies. The case is put down for "hearing at Marlborough Street Police Court on December 30." Then the print gets slightly blacker, and more emphatic: "Annual returns." Then "Annual returns for 1936 made "to the Registrar of Friendly Societies shewed a profit of "4833*l.*, but this was made, as was stated in the return, "only after including 11,131*l.* net proceeds from the sale of "a ground-rent of one of the society's properties, and 7768*l.* "surplus of realisation on other properties." The print then becomes fainter: " In their report on the 1936 Accounts, "the Auditors drew attention to the sale of the ground-rent, "and gave their opinion that this amount was not a realised "profit." Then in large letters comes " The Directors "; and then in smaller letters: "The Directors of the Society "at the time of the last Annual Report were Brig.-Gen. Sir "William Horwood, G.B.E., K.C.B., D.S.O. (Chairman), a "former Commissioner of the Metropolitan Police; Sir Gervais "Rentoul, K.C., a London Magistrate; Lord Massereene

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"and Ferrard, D.S.O., and Mr. J. Wolstenholme (Managing "Director). Sir Gervais Rentoul told the 'Daily Herald' "last night 'The Summonses are in connection with the " 'Balance Sheet issued last year, when I was a Director. " 'Viscount Massereene resigned two or three months ago " 'because he was ill. Sir William Horwood and Mr. " 'Wolstenholme are still Directors.'" On Friday, December 10, that is to say some thirteen days before the issue complained of, there had been another statement in the same newspaper headed "Friendly Society Heads may be sued." [His Lordship read that statement as above set out, and continued :] In the statement of claim the complaint, at any rate so far as we have now to consider the matter, is limited to the issue of December 23, which I have read. There is pleaded in para. 5 the following innuendo: [His Lordship read that paragraph as above set out and continued :] The innuendo there pleaded was objected to by the defendants, on the ground that the words in their natural and ordinary meaning were incapable of the innuendo there set out. The learned judge ruled, however, that the words were capable of an innuendo and left the matter to the jury. That ruling is the subject in this Court of a cross-appeal.

The words being left to the jury, the judge, for convenience, disintegrated them into six different allegations, to each of which the jury replied "Yes," as follows: the words "meant "and were understood to mean" that the plaintiffs "had "deliberately falsified their accounts"; and that they "had "published a return of annual profits which they knew to be "wrong," and which they "had been advised by their auditors "to be wrong"; and "that they had done so with a view to "deceiving their shareholders and bondholders and the general "public as to their true financial position"; and "that they "were insolvent or in an unstable financial position, and a "society which investors should avoid"; and "that they "carried on their business . . . . by dishonest methods." All those words the jury found were words which arose out of the statement made in the issue of the Daily Herald on December 23, 1937. A more terrible indictment of a society of this kind it is difficult to imagine. Every kind of fraud and falsity, according to the jury, were suggested by the words used; and, of course, so far as the innuendo was concerned, there was no attempt at any justification. Nevertheless the jury, despite this finding of falsity and fraud and attempt at deception of shareholders and the like, compensated the plaintiff society in the small sum of one farthing: and there is an appeal to this Court for a new trial on that ground.

Counsel for the appellants says that in his view the new trial should be limited to the quantification of damages assessed properly; and that as on all other matters he has succeeded, he asks us to limit the order for a new trial, as was done in the case of *Tolley* v. *J. S. Fry & Co.* (1), to the assessment of damages.

The cross-appeal logically comes before the appeal, because if it be true that the learned judge was wrong in leaving this matter of innuendo to the jury, it would follow that the plaintiffs would fail, because, as they admitted, in one sense the words as stated in the article were true. I say "in one "sense" advisedly, because, as I see this case, some confusion appears to have arisen as to the meaning of these words. It is said by the plaintiffs that all those words would convey, in their natural sense, without reference to extrinsic facts, to any reasonable person of ordinary intelligence, experience and education, is the meaning which is attributed to them by the innuendo. They do not seek to set up here any secondary meaning in this sense. They do not say that those words are words which require evidence of special circumstances, or of some special situation, so that the innuendo may be put upon them. They say the ordinary newspaper reader, reading these words, would form the opinion that they did make those accusations against the plaintiffs which are set out in para. 5 of the statement of claim. That, as I understand, is the gravamen of their complaint.

When one comes to look at the language, the matter being, of course, on this head limited to the question of whether the judge was right in holding that the words were capable of the

(1) [1931] A. C. 333.

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innuendo, without evidence of any secondary or special meaning, but in their natural and ordinary meaning, which is what the plaintiffs were contending for, one finds this at the outset. The heading of the whole matter in large type in italics contains this phrase: "False Profit Return Charge Against "Society." It is the society which, as they describe it, is charged with having made a return falsely showing a profit. Stopping at that heading, what does the word "false" convey to the ordinary reader? In the dictionary sense the word "false" may mean deceitful, untrue, dishonest, or it may have the meaning, and I think the more ordinary meaning, of mistaken or inaccurate or untrue without any moral obliquity. But I do not think this is the type of case to which Lord Halsbury referred in *Nevill* v. *Fine Art Insurance Co.* (1), where one has to seek for the evil meaning and discard the innocent meaning. I think the ordinary reader would assume that the word "false" in this context, and stated with this imprint, meant fraudulent. I think one may take into consideration the fact, as was said in *Capital and Counties Bank* v. *Henty* (2) by Lord Selborne (3), approving of what Wilde C.J. had said in *Sturt* v. *Blagg* (4), "the manner and the occasion "of the publication." This article is published in a popular newspaper. If the words "false profit" in a popular newspaper mean that which is merely untrue in the technical sense that a sum has been attributed to profit which, being the proceeds of sale of freehold land, technically should not have been so called, I do not think that would have found expression in large italicized block type as something worthy of observation by the readers of the newspaper. As I pointed out during the argument, we have frequently in this Court, when dealing with revenue cases, to decide the very difficult question whether a particular profit or gain is to be considered income so as to attract tax, or is a capital increment. I have never known the Daily Herald or any other daily newspaper, if some person has falsely stated that to be capital which has turned out ultimately to be income, to honour that state of things by a statement in large letters in italics: "False return "to the Income Tax Authorities." I think one is entitled to have regard to the mode and occasion of the publication and to say that a jury might come to the conclusion that these words were defamatory in their ordinary and natural meaning, having regard to the place in which they appear in this paper, and having regard to the fact that the word "false" is ambiguous and, if not in its primary meaning, that it may at least connote something of a fraudulent nature. All that the learned judge had to do was to decide that these words were capable of that meaning and I think he was right in leaving the matter to the jury in that form.

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(1) [1897] A. C. 68.
(2) 7 App. Cas. 741.
(3) 7 App. Cas. 744.
(4) (1847) 10 Q. B. 906.

We have been told the history of this matter. The facts so far as they are material are these: It is quite true that a summons was taken out against the plaintiff society. Being registered under the Industrial and Provident Societies Acts, it is required under the Act of 1893 to make an annual return which has now, by an amending act, to be passed by public auditors. A difference of opinion arose between the society and those auditors as to whether on the return a certain accession to the wealth of the society should or should not be treated as a profit. It seems to me material to consider whether the method employed of dealing with the matter, namely, the bringing of proceedings under s. 10 (*c*) of the 1913 Act before the magistrate in the form of an information alleging that the society had made a return which was false, was an appropriate method for that purpose. Whether it is expedient to test these nice points by means of criminal proceedings I doubt. We have expressed recently, in a test case under the Stamp Act, the view that it is very often undesirable. Be that as it may, this case was brought before the magistrate, after this publication in the Daily Herald, with the result that this society was fined 5*l*., it being stated by counsel for the prosecution more than once, and repeated by the magistrate, that no suggestion of fraud or improper dealing had been made at all. The magistrate took the view of the public auditors, that technically the price of the ground rent was not a profit, a view contrary to the advice which had been given by an eminent King's counsel to the society which had taken legal opinion on the matter. So much, therefore, for the main ground of the cross-appeal.

Certain other grounds, however, were alleged with regard to the cross-appeal. One was that there was a misdirection by the learned judge in that he drew the jury's attention to the earlier issue of the paper of December 10, which I have read. I think that the article in that earlier issue was rightly received as evidence. The only possible objection to its reception is that it does not identify by names the society and the directors. The satisfaction of the appetite of curiosity raised on December 10 was only completed on December 23. But nothing turns on that matter. The learned judge simply said that, as a matter of history, he would refer to the issue of December 10. It may be that more use might have been made of it on behalf of the plaintiffs, but, as I understand, very little use was made of it at all. There was obviously no misdirection there.

Another objection raised in support of the cross-appeal was that the view of Mr. Dean, who was the chairman of directors of the plaintiff society and was called as a witness, should not have been allowed to be before the Court. Much of Mr. Dean's opinion of this article was elicited in cross-examination and I find it difficult to see how that can possibly be a ground on behalf of the defendants for a new trial. I am rather inclined to agree that the opinions of Mr. Dean may be entirely irrelevant but their irrelevance has not in any way caused a miscarriage of justice.

I am of opinion, for the reasons I have stated, that the cross-appeal fails.

Then one comes to the substance of this matter, which is the ground of the appeal by the plaintiffs. As I have said, Mr. Holmes based his appeal on two grounds. The first was misdirection. With regard to that, what is said is that the learned judge left the jury with the impression that on the one hand, either they must be satisfied that the plaintiffs had suffered a loss in business as a result of this libel, or, on the other hand, if they thought that was not so, they should not give any pecuniary damage other than some merely nominal amount or nothing at all.

The actual words particularly complained of were these: "It was open to the plaintiff society here, if they had thought "right to do so, to plead what is called special damage. I "dare say some of you may have had experience of that and "you may have been in a jury box before. If not, I dare "say you have read accounts of trials in which people have "said: 'I have been damaged by this man. I had a good " 'contract which was just going to be signed, and as a result " 'of my being held up as a rogue, the thing went off. I was " 'going to get a big order and make a large deal, and the " 'deal went off,' and so forth. That is what is called special "damage. It is damage which the plaintiff says can be shown "to have arisen as a result of this libel, or injury, or whatever "it was. Nothing of the sort was suggested here. There was "no evidence that the company lost any business, but it is "true that if a person publishes a defamatory libel of another, "the law always assumes that that may have caused him "some damage." I speak on this point with considerable diffidence, having regard to the very great experience of this learned judge and, if I may say so, his extreme capacity, particularly in summing up to juries. But I cannot help feeling that, in dealing with this particular paragraph, more especially having regard to what happened in the result, the jury must have come to the conclusion that in so far as they were not satisfied that the company had lost any business, they must treat the damages as quite nominal or trivial. If they did go into their deliberations with that view they were entirely in error. A libel by the invasion of a legal right gives a right to damages. It is the duty of the jury to assess those damages, which may be punitive or contemptuous, or, in an ordinary case, may be such as would recompense the plaintiff for the wrong done to his reputation. That is altogether apart from any question of special damage. I think that principle is clearly recognized and needs no authority to support it.

In the result the jury gave a farthing and they seem to have been reluctant to give even that, because they asked the learned judge: "Are we bound to award damages?" That doubt may have arisen from the fact that the judge had said they "may" award damages. The judge then, perfectly correctly, told them: "Members of the jury, you are bound, "if you come to the conclusion which you have come to, to "say what damages are recoverable. I do not say you are "bound to award any particular sum." The foreman of the jury: "Then the damages will be one farthing, my Lord." From these inquiries it rather looks as though they would have been inclined to give no damages at all, if they had not been compelled to do so.

However that may be, whether it was due to a misunderstanding by the jury of the position and of their duty consequent, perhaps, upon the direction, or whether it was due to the fact that they acted in a way which in law no reasonable jury could act, I do not know, but in the result they gave a farthing, which seems to me a finding impossible to sustain. For myself, for the reasons I have indicated, I think there was here a misdirection, but in any case I think that no jury, having found this terrible series of innuendoes to be that which an ordinary person would understand by reading this issue, could properly award such a sum. It seems to me so wholly insufficient to the case that I think there will have to be a new trial.

I think it would be very wrong if, in ordering a new trial, we were to put Mr. Holmes' clients in jeopardy once more as to the whole of the case. They have established to the satisfaction of the jury that an article has been written containing, according to the meaning which a normal man would put upon it, these injurious reflections upon them. It seems to me, therefore, that the only matter left, the cross-appeal having failed, is the question of damages, and on that, as I say, in my view there should be a new trial. As the parties cannot consent to letting this Court assess the damages there will have to be a new trial limited to the quantification and assessment of damages.

MacKinnon L.J. I agree. The accurate title of the item of news published by this paper might have been something like this: "Dispute between accountants as to the proper "principle of drawing up a balance-sheet." I can hardly doubt that the publishers of this newspaper would have thought that such a matter was not worth reporting at all, even in the smallest paragraph, or that if it were reported in the smallest paragraph in the smallest type it would have been of the least interest to any of their readers.

Here I find that, following on a paragraph with enormous headlines published on December 10 intimating that a charge is going to be brought with the assistance of a person clearly indicated as the director of public prosecutions against a friendly society with directors of title, there is in this issue of December 23 a lengthy paragraph with headlines in very large type, which include the words "false charge" and begin with the words "Summonses have been issued." I find further a statement of the names, titles and qualities of the directors, which is quite an unnecessary addition to the paragraph. The plaintiffs alleged that this publication meant and was understood to mean, and was only capable of being understood to mean, that the directors had been guilty of some criminal turpitude. I am clearly of opinion that the words are capable of that interpretation and that therefore the plaintiffs' case was rightly left to the jury. That is all that it is necessary for me to say in deciding the cross-appeal, but, as Mr. Field has strenuously argued that no reasonable man could so understand them and therefore the words should not have been left to the jury, I am tempted to add that I am quite convinced that this was the meaning that the defendants in fact intended and I am equally convinced that it is the meaning that any reasonable man would attach to them. Therefore, in my view, the cross-appeal fails.

As to the appeal, I think that the learned judge, having gone through all this matter, was most unfortunately a little hasty in dealing with the damages. Reading what he said, and what the jury said, I am satisfied that the jury were left under the belief that unless special damage was proved the plaintiffs would only be entitled to nominal damages. That is the reason why they arrived at the amount

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which they awarded to the plaintiffs, namely one farthing. If they had been told that if they found serious aspersions on the defendants damage must be assumed, and that without proof of any actual loss sustained they ought to award such an amount of damages as would show the untruth of the imputation and the seriousness of the charges, it is quite impossible that they as a reasonable jury would have given only a farthing. I rather regret that the defendants will not consent to our fixing the damages. I had originally settled in my mind on a figure which I thought would be sufficient to mark the seriousness of this accusation without being excessive. I am bound to say I rather increased that amount because I recollected that having had their attention drawn to the matter in a letter of February 2, and it being requested that an explanation should be put in the paper, the defendants refused somewhat curtly and said that " there never was any "design to do anything other than to publish what they knew "to be a fact." I do not think that was candid, and I do not think it was true. For that letter I should, on further consideration, have increased the damages. We are not, however, allowed to fix them, and therefore there must be a new trial, and, I agree, a new trial on the issue of damages only.

Goddard L.J. I agree. Out of deference to the attractive argument of Mr. Shawcross, I think I ought to add a few words of my own.

This case is a very good illustration, by way of warning, of the dangers which newspapers run if they publish information about pending litigation. They are amply protected in publishing reports of cases which are heard in Courts. But if they publish inaccurate information about pending litigation, they do it at their own risk.

The way that this case has arisen is this. The Industrial and Provident Societies (Amendment) Act, 1913, s. 10 (*c*), provides that it shall be an offence under that Act if, among other things, " a registered society, or any officer or any "member thereof, or any other person, makes a return or "wilfully furnishes information in any respect false or "insufficient." It may be that some day it will have to be decided, not in this Court, because the case would be in the Crown Paper and heard in the Divisional Court, whether those words "makes a return . . . . false or insufficient" mean makes a return which is merely incorrect; or whether the word "false" there implies some conscious falsity. It is immaterial for us to consider that question in this case, because, in fact, it has been assumed throughout in this case that the word "false" in that section, for the purpose of giving a magistrate jurisdiction to convict, means no more than incorrect. I reserve my opinion on that question: but it may very well be that the view which has here been assumed is right.

What in fact happened here was, that a summons was issued against this society for making a false return. Counsel for the chief registrar, who appeared to support the summons, stated on his instructions more than once that there was no question whatever as to any moral guilt or any fraud on the part of the society. All that was said was that a particular entry was incorrect, it being alleged on behalf of the prosecutor that the accountant who had advised the society and the learned counsel who had also given an opinion were wrong, and that the public auditor was right. This summons was stated to have been issued as a test case, and not as one involving any fraud or misconduct at all on the part of the plaintiffs.

The cross-appeal in the present case is based principally upon the ground that the defendants published nothing in their newspaper except what was strictly and accurately true, because they said that a charge had been made of making a false return, and that such a charge had in fact been made. I think that the difficulty which lies in their way is this: They did not say that the return was merely a false return in which no suggestion of fraud arose. They used the word "false," which is ambiguous, and which would convey to the ordinary person, and therefore to most people, that the society had made a fraudulent return. The man on the Clapham omnibus, to use Lord Bowen's classic illustration, does not, when he has the Daily Herald in his hand, also have in his hand a copy of Mr. Baden Fuller's book on Friendly Societies, or a copy of Mr. Gasquet's Friendly Societies Acts, or a copy of Stone's Justices' Manual to help him to understand the nature of such a charge. Any ordinary man, reading these passages from the newspaper, would, I think, inevitably consider that a charge involving moral obliquity on the part of the directors was being made against the society. If a further explanation had been given, if entirely different language had been used, the position would have been altered. It would have been quite possible for the newspaper merely to announce the fact that a charge under the particular section had been preferred. But having regard to the way in which this article was set out, and especially to the headlines, and the language used, the inevitable result, I think, would be to lead anybody who read it to think that a charge of dishonesty was being preferred. I am supposed to know the law, but I do not pretend that I can carry accurately in my head all the provisions of the Industrial and Provident Societies Act, 1892, as amended by the Act of 1913. I should certainly have supposed that a charge of dishonesty was being made against the directors of the society. It therefore seems to me that it would have been quite impossible for the learned judge to hold that the words were incapable of a defamatory meaning, and I think that the learned judge was perfectly justified in leaving the case to the jury.

The only point on which I had any doubt was whether he should have said that there was no evidence to support, and that the words were incapable of supporting, one innuendo, namely, that the society were insolvent. But as the innuendo which was set forth was that they were insolvent or in an unstable financial position, I do not think any complaint can be made about it; because I think it is capable of the construction that they were in an unstable financial position. In any case, it would not matter, because the jury found all the rest of the innuendoes were proved.

That being the case, the jury returned a verdict of a farthing damages. Obviously that cannot stand. I do not refer to

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any particular word or passage in the summing-up of the learned judge, because, unfortunately, the whole summing-up on the question of damages conveyed the impression to the jury that this trading company had suffered no damage, or at least that it had not been proved that it had suffered any damage, and, therefore, that in those circumstances the damages could be nominal. He said that very often juries read in newspapers about a farthing damages; but that those were contemptuous damages, and not nominal damages. I think that the fact that such observations as that were made in the summing-up is the real reason why the jury gave the farthing. That that was the intention of the learned judge, and that that was the view which he took of the verdict of the jury, I think is shown quite clearly by what he said the next day, when he gave judgment. He said: "The jury took the view that the plaintiffs, who are a company "or corporation, had not been shown to have suffered any "damage from the publication of what they considered "defamatory matter about them. I think the jury were "quite entitled, on the evidence in this case, to come to the "conclusion, assuming that some defamatory matter had "been published about the plaintiff corporation, that there "was a complete absence, and a deliberate absence, of any "attempt to show that they were a penny the worse and, "in those circumstances, the jury awarded one farthing "damages to the plaintiffs." That, I think, is the impression which the jury would get from the learned judge's summing-up: and if it gave them that impression it was not right. There is no obligation on the plaintiffs to show that they have suffered actual damage. A plaintiff may, if he can, by way of aggravating damages, prove that he has suffered actual damage. But in every case he is perfectly entitled to say that there has been a serious libel upon him; that the law assumes that he must have suffered damage; and that he is entitled to substantial damages. If the defendant, by giving evidence in mitigation of damages, or by saying that the libel is very nearly true, but not quite, can mitigate the damages, be it so. But in this case the defendants did nothing

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of that sort. It would have been open to the defendants in this case to attempt to justify the libel by saying that they were not bound by what the magistrate found in the police court proceedings; that this was a dishonest return; and that the plaintiffs made it dishonestly. Instead of choosing to do that, they accepted the situation that there was no moral obliquity on the plaintiff society at all.

Therefore, one gets the position of a trading company having been charged, as the jury find by their answers to the questions left to them on the innuendo, with the most disgraceful conduct that any company could be charged with; and yet the jury are told that because the company have not given any evidence showing actual pecuniary loss, they can properly be compensated by a farthing. That was undoubtedly a misdirection.

Apart from that, it was a verdict which, in my opinion, no reasonable jury could find.

Appeal allowed.
Cross-appeal dismissed.
New trial ordered of issue as to amount of damages only.
Leave to appeal to House of Lords refused.

Solicitors for plaintiffs, appellants: *Randolph & Dean.*
Solicitors for defendants, respondents: *Lewis & Lewis.*

J. R.

BRITON FERRY STEEL COMPANY, LIMITED *v.* BARRY (H.M. INSPECTOR OF TAXES.)

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Revenue—Income Tax—Company—Subsidiary companies—Amalgamation—Company treated as succeeding to trade of subsidiary companies—Method of computation of profits—Finance Act, 1926 (16 & 17 *Geo.* 5, *c.* 22), *s.* 32, *sub-s.* 1.

A company carried on the business of making steel bars which it sold partly to outside customers and partly to six subsidiary companies, which used them in the manufacture of tinplate. On April 7, 1934, the subsidiary companies were wound up and their assets and undertakings transferred to the company. The company was assessed to income tax for the years ending April 5, 1935 and 1936, in regard to the part of its business so acquired on the footing that it was a successor to the trade previously carried on by the subsidiary companies within the sub-rule substituted for r. 11, sub-r. 2, of the Rules applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918, by the Finance Act, 1926, s. 32, sub-s. 1. On an appeal:—

Held, (1.) that the company was properly assessed to tax as a successor to the part of its trade previously carried on by the subsidiary companies; and (2.) that the proper method of computing the profits of the trade succeeded to was to treat the steel bars used for the manufacture of tinplate at the mills formerly belonging to the subsidiary companies as transferred to that part of the company's business at cost price.

Decision of Macnaghten J. affirmed.

Laycock v. *Freeman, Hardy & Willis, Ld.* [1939] 2 K. B. 1 distinguished.

Appeal from Macnaghten J. on a Case Stated by the Commissioners for the Special Purposes of the Income Tax Acts.

On May 27, 1937, the Briton Ferry Steel Company, Ld. (hereinafter called "the company"), appealed to the Special Commissioners against assessments to income tax in respect of profits from the trade of steel sheet and tinplate manufacturers for the years ending April 5, 1935 and 1936 respectively.

The company was incorporated in 1899 and down to 1934 the main business of the company was the production of steel bars which were supplied to subsidiary companies and to various other consumers for conversion into blackplates

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and/or tinplates. At one of the works the company carried out the process of converting steel bars into blackplates.

For a number of years the company owned the entire share capital of the following companies (hereinafter called "the "subsidiary companies"): Aberavon Tinplate Co., Ld., Ferry Tinplate Co., Ld., Ffrwdwyllt Tinplate Co., Ld., Resolven Tinplate Co., Ld., Morriston Tinplate Co., Ld. The business of the subsidiary companies was the manufacture of blackplate and tinplate. Tinplate is produced by applying a coating of tin to blackplates and the manufacture of blackplate and tinplate has always been so closely allied as to be considered in the industry as one and the same business, the markets for and the consumers of the two products being practically the same. As stated, the subsidiary companies purchased from the company the necessary supplies of steel bars and rolled these into blackplates and then converted the blackplates into tinplates by the process referred to above.

From 1924 to 1931 the subsidiary companies were members of the South Wales Tinplate Corporation, Ld., which purchased the whole of their output for resale, but in May, 1931, the subsidiary companies withdrew from the corporation for economic reasons and it became necessary to set up a new sales organization. Accordingly on May 28, 1931, a company was formed by the company under the name of the Briton Ferry Steel and Tinplate Agency, Ld. (hereinafter called "the agency"), with a capital of 500*l.*, the whole of which was held by the company. The directors of the agency were directors of the company and two managing directors were appointed.

From May, 1931, until April 7, 1934, the course of business was as follows: The agency found the purchasers of tinplate and for this purpose had to work up a trade connection from the start. Having found a purchaser the agency and its directors selected the works of such one or more of the subsidiary companies as was best suited to produce goods to the purchaser's specifications and gave instructions to these works accordingly. All contracts for sale were made by the agency as principal. The agency was entirely responsible for finding outlets for the productions of the subsidiary companies.

In pursuance of a scheme of reorganization the subsidiary companies went into liquidation on April 7, 1934, and on the same day an agreement was entered into between the liquidator of each subsidiary company and the company which in terms provided for the transfer to the company of the subsidiary company's assets, including the undertaking, business and goodwill. After April 7, 1934, the mills of the subsidiary companies became branch mills of, and were operated by, the company. Sales continued to be made through the agency.

The assessments under appeal were made upon the footing (*a*) that the company had succeeded to a trade carried on by each subsidiary up to April 7, 1934, within the meaning of s. 32, sub-s. 1, of the Finance Act, 1926, or, in the alternative, (*b*) that the company had set up and commenced a new trade on that date, and that, accordingly, there should be included in the company's assessable profits the actual profits for the periods to March 30, 1935 and 1936, derived from each of the mills formerly carried on by the subsidiary companies. On behalf of the Crown the assessments were supported on both of these grounds but the Commissioners held that they could not be supported on the alternative ground (*b*).

It was contended on behalf of the company :—

(1.) That the company had not succeeded to any trade or trades within s. 32, sub-s. 1, of the Finance Act, 1926. (1)

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(1) The Finance Act, 1926 (16 & 17 Geo. 5, c. 22), s. 32, provides : "(1.) For rule 11 of the Rules "applicable to Cases I. and II. of "Schedule D there shall be sub-"stituted the following :—. . . . . "(2.) If at any time after the said "fifth day of April [1928] any "person succeeds to any trade, "profession or vocation which "until that time was carried on by "another person and the case is "not one to which paragraph (1.) "of this Rule applies, the tax "payable for all years of assess-"ment by the person succeeding "as aforesaid shall be computed "as if he had set up or commenced "the trade, profession or vocation "at that time, and the tax payable "for all years of assessment by "the person who until that time "carried on the trade, profession "or vocation shall be computed "as if it had then been discon-"tinued . . . . "

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(2.) That at April 7, 1934, the company—which then controlled the subsidiary companies and the agency—was already possessed of and controlled the means of outlet of the production—and therefore the profit-making capacity—of the subsidiary companies which had no goodwill or trade connections capable of transfer to the company.

(3.) That at no relevant time were the subsidiary companies carrying on any trade or trades which could be separated from the trade of manufacturing and selling blackplate and tinplate carried on by the company through the subsidiary companies and the agency.

(4.) That in order to constitute a succession within the section it was necessary that the successor should acquire from a predecessor, who ceased to carry it on, a trade previously carried on by the predecessor and that that was not so in this case.

(5.) That what the company did acquire under the agreement of April 7, 1934, was not a number of trades but only certain physical assets of and debts due to the subsidiary companies subject to discharge of their liabilities.

(6.) That the assessments were erroneous and excessive in that they should not include the profits of the subsidiary companies for the years in question.

It was contended on behalf of the Crown :—

(1.) That each subsidiary company carried on the trade of manufacturing plates and selling them to customers through the agency.

(2.) That by the said agreements of April 7, 1934, the benefit of the trade carried on by each subsidiary company was transferred to the company.

(3.) That the company in fact succeeded to the trade of each subsidiary.

(4.) That the assessments were correct in principle.

The Commissioners decided as follows : " From 1931 the "subsidiary companies found an outlet for their products "through the agency company, which was controlled by the "parent company. In our opinion, each subsidiary company "had something more than mere physical assets to dispose of, "namely, a trade capable of being succeeded to by the parent "company and which was in fact succeeded to by the parent "company."

On an appeal to Macnaghten J. he said that the Inspector of Taxes alleged that the company was to be assessed in respect of a new trade under sub-r. 2 of r. 11 of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918, as amended by the Finance Act, 1926, s. 32. The present case seemed at first sight to fall exactly within that rule but the company contended that it had not succeeded to any trade because on April 7, 1934, it was already possessed of and controlled the means of outlet of the product (and therefore the profit-making capacity) of the subsidiary companies. That contention was based upon the inadmissible assumption that the agency was the same as the company. It was in fact a separate legal entity carrying on a separate business. He was unable to see how it could be said that the fact that the products of the subsidiary companies were disposed of by another subsidiary could take the case out of r. 11, sub-r. 2, as set out in s. 32 of the Finance Act, 1926.

A further contention had been put forward on the authority of the decision of Lawrence J. in *Laycock* v. *Freeman, Hardy and Willis, Ld.* (1), a case that was then proceeding to the Court of Appeal; but in his view that case had no bearing on the present case as the trade of the five subsidiary companies could not be said to have come to an end.

An appeal by the company from this decision was heard by the Court of Appeal on March 9, 1939, after the appeal in *Laycock* v. *Freeman, Hardy and Willis, Ld.* (2) had been heard and the case was remitted to the Special Commissioners for them to reconsider their findings of fact and law in the light of the decision of the Court of Appeal and the observations in the judgment of Sir Wilfrid Greene M.R. in *Laycock* v. *Freeman, Hardy and Willis, Ld.* (2)

As a result, the Special Commissioners stated a supplement to the Case which was substantially to the following effect: Pursuant to the order of the Court of Appeal made on

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(1) [1938] 2 K. B. 836.

(2) [1939] 2 K. B. 1.

March 9, 1939, the Commissioners had a meeting on June 20, 1939, to hear further evidence and arguments in this matter.

The following facts were admitted or proved :—

(1.) The processes of manufacture resulting in the product of blackplate and tinplate were as follows :—

(*a*) pig iron or scrap iron is smelted in Siemen's open hearth furnaces and cast in the form of ingots ;

(*b*) the ingots were next heated and rolled in the form of steel bars and billets ; in the course of rolling the ends of the bars were cut off and used again in the furnaces as scrap ;

(*c*) the steel bars were then cut into suitable lengths, reheated and rolled into thin sheets resulting in the production of blackplate ; scrap arising in the course of this process was also returned for use again in the furnaces ;

(*d*) tinplate was produced by dipping blackplate into molten tin and passing it through rollers so as to leave a thin coating of tin on the blackplate.

(2.) Before April 7, 1934, the company carried out the first and second processes at its steel works at Briton Ferry. The company sold some 4000 to 5000 tons of ingots and about the same quantity of billets annually to outside customers. It also carried out the third process at its Vivian blackplate works. A very considerable quantity of steel bars was sold to outside customers and the remainder was sold to the company's subsidiary companies and also to another subsidiary company called the Melyn Tinplate Co., Ld.

(3.) Before April 7, 1934, the subsidiary companies carried out the third and fourth processes, any resulting scrap being sold to the company. The whole requirements of steel bars of the subsidiary companies were purchased from the company.

(4.) After April 7, 1934, the company continued to produce ingots, billets and steel bars for sale to outside customers. Steel bars were also transferred to the works of the former subsidiary companies where the processes of rolling blackplate and tinning were carried out. Transfer of steel bars and of scrap between the various works were recorded in the books of the company.

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(5.) The value of the plant employed in the tinning process represented approximately 12½ per cent. of the total value of the plate production plant in each of the plate works. Of the total process costs in all stages the tinning costs represented approximately 10 per cent. The capacity of the Vivian works in terms of boxes of plate was about 3500 a week, and of the other works was between 35,000 and 40,000 a week.

It was agreed that the activities of the works of the Melyn Tinplate Co., Ld., which were acquired at the same time and in the same circumstances were also involved in this appeal.

The Special Commissioners having further considered the facts and arguments found :—

"(1.) that the company did not set up an entirely new "trade on April 7, 1934;

"(2.) that the company did not set up a new trade of tin-"plate manufacture on April 7, 1934;

"We further find that the appellant company did succeed "to the trade of bar rolling and plating, formerly carried on "by each of the subsidiaries on April 7, 1934, and had con-"tinued to carry on such trade.

"In arriving at this finding we have put to ourselves the "question formulated by the Master of the Rolls in *Laycock* "v. *Freeman, Hardy and Willis, Ld.* (1) :—

"'Whether or not it is true and fair to say that the "'business in respect of which the successor is said to be "'making profits is the business to which he succeeded.'"

"We do not think that the fact that a purchaser of a trade "chooses to amalgamate that trade as a department with "his own prevents a succession if in other respects the "identity of the trade acquired is preserved. In the present "case we find that the identity of the trades formerly carried "on by the subsidiaries has been preserved. As we under-"stand it we see no necessity for imputing any notional "profit or expense either to the steel works or to the plate "works. The appellant company produces these steel bars, "not for resale but for the purpose of its plate department.

(1) [1939] 2 K. B. 1, 8.

"The profits of the plate works of the appellant company is "the actual profit on the sale of plates, namely, the difference "between the actual sale price of plates and the actual cost "of producing plates through each process."

The appeal again came before the Court of Appeal on December 6 and 7, 1939.

Cyril King K.C. and *F. Grant* for the appellant company. The Special Commissioners were wrong in holding that there had been a succession to the trade carried on by the subsidiary companies. The company never succeeded to this trade but merely expanded their business so that the tax for the two years in question ought simply to have been calculated on the profit of the company in the preceding year. Before April 7, 1934, the subsidiary companies were carrying on the business of buying steel bars and making them up into tinplates which they sold. A continuation of that process is implicit in the idea of a succession, but in fact after April 7, 1934, the steel bars were not bought but made by the company's original business and transferred to the departments representing the subsidiary companies. An essential element of the business as carried on before that date came to an end and there could be no succession.

[Sir Wilfrid Greene M.R. Was not the business of making tinplates the business of the subsidiary company and the acquisition of steel bars for the purpose of this trade merely part of their expenses?]

The sphere of trade of the subsidiaries was to purchase steel bars and carry on with the processes of making blackplate and tinplate. That is how they made their profit and the profits would be quite different if their business started from the pig iron stage and included all the processes of converting that into steel bars. The basis of the original decision of the Commissioners was that these profits must be calculated by reference to notional sales to them of steel bars, and assessments were made on that footing for the purpose of the alleged succession. There was no justification for this under r. 11, sub-r. 2, of the Rules to Cases I. and II. of

Sch. D to the Income Tax Act, 1918, as enacted in s. 32 of the Finance Act, 1926. The whole question is whether the same trade was being carried on by the company after April 7, 1934, as was previously carried on by the subsidiaries, and in ascertaining this there was no justification for introducing the idea of notional purchases any more than of introducing the idea of notional sales in *Laycock* v. *Freeman, Hardy and Willis, Ld.* (1)

[SIR WILFRID GREENE M.R. I can understand the objection to introducing notional sales, but the steel bars used might be taken as passing into that part of the company's business previously carried on by the subsidiaries at cost price.]

Even so the distinction remains that after April 7, 1934, no business was being carried on which consisted of the purchase of steel bars and making them up to blackplate and tinplate so that there was no succession. There is the further element in this case that before April 7, 1934, scrap produced in the course of making the tinplates was resold to the company. The scrap was then put back into the furnaces by the company and smelted down. This scrap is now merely retransferred from the branch mills previously worked by the subsidiary companies to the part of the company's business originally carried on by it. For that purpose a notional sale must be implied by the plate works to the steel works, and this again shows that there is no justification for holding that there was a succession. The decision of the Commissioners in the supplemental Case was therefore wrong in law as not having correctly applied the *Freeman, Hardy and Willis* case. (1) Alternatively, there was no evidence on which the Commissioners could properly come to the conclusion that this entirely fresh trade carried on by the company was the same trade as that of the subsidiaries. Further, it cannot be right to treat as a succession trades which involve cutting off part of the company's trade and that would be the effect of treating the steel bars as transferred to the branch mills at cost price.

[CLAUSON L.J. Is it not the right view that as a result

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(1) [1938] 2 K. B. 836; [1939] 2 K. B. 1.

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of the amalgamation of the businesses of the subsidiaries with that of the company, the company lost six customers—namely, the subsidiaries ?]

It cannot be right to treat the profits of the company's original business as reduced for the purpose of giving to that part of the business previously carried on by the subsidiaries increased profits which they never could have made as subsidiaries. The whole idea is foreign to the conception of a succession and of the same businesses being continued after the succession. Further, the products of the subsidiaries' manufacture were tinplate and scrap, both of which were sold, and unless the idea of a notional sale of scrap is adopted the business after April 7, 1934, is obvious not the same business.

In *Bell* v. *National Provincial Bank of England, Ld.* (1) it was pointed out that a succession involved the idea of the business succeeded to going on so that the succession and the original business must be kept separate indefinitely. That is not practicable in this case.

Sir D. Somervell A.-G. and *Reginald Hills* for the Crown. The general idea of a succession was primarily applied to the case where a person who was not previously carrying on any business acquired that of some one else. The difficulties arise when Order XI., r. 2, is applied, as it is now well settled that it must be, to the acquisition of a business by one who is already carrying on a similar business of his own. In such a case the separate computations involved must always involve an actual splitting up of activities which have really become those of one business. It is an accountancy problem: see *Bell* v. *National Provincial Bank of England, Ld.* (1) The Crown's first contention in this case is that the case is concluded in the Crown's favour by the findings of fact of the Special Commissioners in the supplementary Case. There they put to themselves the question directed in the *Freeman, Hardy and Willis* case (2) and on the evidence found that no difficulty arose in applying that case, because the businesses to which

(1) [1903] 2 K. B. 249; [1904] 1 K. B. 149; 5 Tax Cas. 1.
(2) [1939] 2 K. B. 1.

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succession was alleged were being carried on after April 7, 1934. The business was that of selling tinplates. It is important here to realize that there are two distinctive questions involved in this case—namely, (1.) whether there has been a succession; and (2.) if yes, what is the method of computing the profits. Here there is plainly a succession, because tinplates are being sold after, just as before the succession and the real difficulties arise in regard to the method of computation to be applied. What has to be ascertained is what are the profits of the particular activities of the succession considered as a separate trade.

[SIR WILFRID GREENE M.R. In the view of the Court it is essential to find out the correct method of computation and the proper method of doing it must be inherent in the case. The Court is not concerned with any rough and ready arrangement between the taxpayer and the Crown, but must arrive at the right method.]

The advantage of taking the steel bars used in what were the subsidiary businesses as purchased from what was the old business is that the old business will be treated as continuing its old activities.

[SIR WILFRID GREENE M.R. Surely the only possible course is to treat the steel bars as coming into the businesses in respect of which there is a succession at cost.]

The Crown is prepared to accept that view but the result will be that the original business will be treated as losing part of its trade. [They were stopped.]

Cyril King K.C. replied.

SIR WILFRID GREENE M.R. This appeal arises out of assessments to income tax made upon the appellants in respect of the years ending April 5, 1935, and April 5, 1936. The assessments were made upon the basis that on April 7, 1934, the appellants succeeded to the businesses previously carried on by six companies which were what is commonly called " wholly owned " subsidiary companies of the appellants. Before April 7, 1934, when the businesses of the subsidiaries were transferred to the appellants, the subsidiaries having

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been put into liquidation (which date for convenience I will call "the amalgamation date"), the business activities of the appellants consisted of making steel bars which they sold in part to the subsidiaries, in part to outside purchasers, and part of their production they themselves used for the purpose of making what is known as blackplate in a factory of their own. Steel bars are produced by two processes, (1.) the smelting of pig iron or scrap iron and casting it into ingots; and (2.) the heating and the rolling of the ingots to turn them into steel bars. Those were the commodities which they sold to their subsidiaries. The business of the subsidiaries consisted in making from those steel bars tinplate which they sold. The further processes necessary for making the tinplate consist of cutting the bars, rolling them into thin sheets which are called blackplate, and then dipping the blackplate into a bath of molten tin and passing it through rollers, which turns it into tinplate. Those processes were the processes carried on by the subsidiary companies, and their profits were, of course, ascertained by reference to the price which they paid to the appellant company for the bars and the profits that they made out of selling the ultimate product, the tinplate. There is one thing that arises in the course of these operations, namely, scrap, with which I will not deal now, but I will mention later a particular argument that was founded upon it.

After the amalgamation date, what I may call the original activities of the appellant company underwent a change, because, as Clauson L.J. put it in the course of the argument, they had lost six customers, namely, the six subsidiary companies, and the steel bars which previously they would have disposed of by sale to those companies they now no longer sold as steel bars at all. Those changes, therefore, have taken place as the result of the amalgamation in the business activities of the appellants. Looking at the business activities of the subsidiary companies and treating those for the moment as being held apart from the activities of the appellants after the amalgamation, the only difference in those activities is that, whereas the steel bars required for the production of the tinplate had previously been acquired by purchase from a separate entity, to wit, the appellant company, they are now produced by the same entity as is producing the tinplate; and, so far as the tinplate part of the business is concerned (by which I mean the part concerned with the operation of turning steel bars into tinplate), the only difference in that part which has occurred is that the raw material of those activities now enters that branch of the business not by reason of a purchase from an outside person, but by coming from the appellant company itself and being used by itself in the tinplate business. Those are, in my view, the main and crucial facts which it is necessary to bear in mind in considering the problem raised by this appeal. The other details are to be found in the original Stated Case and in the supplement to the Case.

In that state of affairs, the Crown took the view that the profits of the appellants for the two years in question fell to be dealt with in accordance with the provisions of sub-s. 1 of s. 32 of the Finance Act, 1926. That section substitutes the rule there set out in the place of r. 11 of the Rules applicable to Cases I. and II. of Sch. D. Sub-r. 2 deals with successions to businesses other than those specifically dealt with in sub-r. 1, which deals with the special case of partnerships, and it provides as follows: "If at any time after the said "fifth day of April"—that is April 5, 1928—"any person "succeeds to any trade"—I read only the relevant words— ". . . . which until that time was carried on by another "person and the case is not one to which paragraph (1.) of "this rule applies, the tax payable for all years of assessment "by the person succeeding as aforesaid shall be computed "as if he had set up or commenced the trade . . . . at that "time."

The Crown claimed that on the facts of this case the appellants had on April 7, 1934, succeeded to the trades theretofore carried on by the six subsidiary companies, and they claimed that accordingly, in assessing the appellant company to income tax for the years in question, the appellant company must be treated as though it had set up the trades

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to which it had so succeeded on April 7, 1934, and that the profits of the appellant company referable to those branches of their activities must be computed as the rule directs.

The matter came before the Special Commissioners, who held originally that the appellants had succeeded to those businesses and they upheld the assessments, subject to certain agreed amendments on figures. The appellants appealed first to the King's Bench Division, and Macnaghten J. upheld the decision of the Commissioners. From his decision an appeal was brought to this Court and, after the case had been opened, or while it was in the course of being opened, the Court, as then constituted, took the view that, in view of a decision of this Court which had not been made public, although I think it had been delivered at the time when the matter was before the Commissioners—a decision which the Commissioners had not got before them when they came to the decision to which they came—it was desirable that the matter should be referred back to the Commissioners in order that they might have an opportunity to reconsider their conclusions both of fact and of law in the light of the decision of this Court in that case. That case was the case of *Laycock* v. *Freeman, Hardy and Willis, Ld.* (1)

At this stage I think it is convenient to say a word of two of a general character with regard to the effect of the sub-rule in question. The sub-rule is expressed in language which is easily applicable to the simple case of a person, who has not previously carried on a business, acquiring a business from somebody who has carried it on and continuing to carry it on thereafter. But the sub-rule indisputably is not limited to that simple class of matter. It extends to much more complicated transactions, of which the present is an example, and it involves, and necessarily involves, a large measure of artificiality in its application. It is obvious that where somebody, be it an individual or a company, who is already carrying on a business, acquires a business from somebody else and continues to carry it on, difficult questions must arise, because, in the ordinary course of business, if the business acquired is carried on, it becomes, to a greater or lesser extent, merged in fact in the old business of the company. It may alter its character; and the reality of the matter is that, as from the date of such an acquisition, there is one business and one business only—namely, the business of the person who is carrying it on. I disregard cases where the business acquired is of a totally different character from that previously carried on. That is the fact of the matter, that one company is carrying on one business: but the sub-rule directs us to regard the position in a different light. We are not entitled, and the assessing authority is not entitled, to treat such a state of affairs as merely an expansion of the business of the acquiring company. The sub-rule directs that the business acquired shall, for the particular purposes mentioned, be held, so to speak, apart from the activities of the acquiring company and for those purposes regarded in a different light. Where the company carrying on a manufacturing business acquires the business of a company which carries on a retail business, or vice versa, it is obvious that the artificiality of this conception is great. Nevertheless, so far as the sub-rule directs this artificial conception to be applied, we are bound to apply it. It is obvious that at one end of the scale there may be a case where there can be no doubt as to the continuing identity of the acquired business. At the other end of the scale there may be a case where it is impossible for a reasonable person to say as a matter of fact that the acquired business any longer is being carried on in any identifiable form. Whether or not a particular case falls within either of those two types of case is, as I view it, a question of law. With regard to the area that lies between those two extremes, as I view it, it is a matter of fact for the Commissioners to say whether or not there is a succession within the meaning of the sub-rule and what are the profits derived from the business to which the succession has taken place. That is one general observation with regard to the sub-rule.

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(1) [1939] 2 K. B. 1; 22 Tax Cas. 288.

There is another general observation which I think it desirable to make in view of an argument put forward by the learned Attorney-General, which I shall have to mention later.

The rule does not suggest that the taxable fund which the taxpayer ultimately is assessed upon is anything but the real profits which he, as a taxpayer, has earned. It is not legitimate, in my view, to apply the sub-rule in such a way as to introduce some element of notional profit with the result of charging the taxpayer in respect of a profit which he has never realized. The object of the sub-rule is to ensure that, in cases where there is the transfer of a business, the person acquiring it shall be treated as having started a new business. If that principle had not been adopted, the result would have been, so to speak, that the business would have been treated as the person to be taxed and not the taxpayer himself, because the acquiring taxpayer would then have found himself charged in the first year after he acquired the business with tax measured by the profits earned by the business at the time when his predecessor owned it. That principle has not been adopted by the Legislature, and instead the acquiring person is treated as having started a new business. In some cases, that may work to his advantage; in other cases, to his disadvantage; but that is the principle.

The third point to which I wish to refer upon this sub-rule is that the direction as to the manner in which tax is to be computed, namely, that it shall be computed as if the trade had been commenced at the relevant time, of course only operates so long as that basis of computation is a relevant matter; and the basis of computation based on the hypothesis that the trade is a new trade lasts for so long only as the provisions of the Act in relation to the setting up of new trades persist. I say that because it was argued on behalf of the appellants that the effect of holding that in the present case there had been a succession would be that for ever afterwards the appellants must be treated for income tax purposes as carrying on not one trade but seven—namely, the six trades of their subsidiaries and their own original trade. I cannot take that view. It seems to me quite clear upon the construction of the sub-rule that this artificial treatment of what in this case, at any rate, is in truth one business, is only to endure for the purposes of computation so long as the setting up of a new business is a relevant matter; and it ceases to be a relevant matter, I think I am right in saying, in the fourth year after the date of setting up.

Having made those general observations, the next thing which I think it is convenient to do at this stage is to say a word or two about the decision in the *Freeman, Hardy and Willis* case (1), because it is upon that decision that the argument of the appellants is mainly based. That was a case where a company carrying on a retail business had acquired the businesses of two subsidiaries of its own which had manufactured the articles sold by the parent company in its retail shops and sold them wholesale to the parent company. After the acquisition of those manufacturing wholesale businesses, the parent company continued to sell in its retail shops articles produced in the factories which it had acquired from the subsidiaries which it had absorbed. Physically, so to speak, the lay-out of these operations remained the same, but there was one vital change in the situation. The business of the subsidiary companies which the Crown alleged was the thing to which there had been a succession had, as was found by the Commissioners, been that of manufacturing wholesalers. That implied that their profits were earned not by the mere act of manufacture but by realizing on sale wholesale the products which they manufactured. After the amalgamation there was no longer in existence a manufacturing wholesale business at all. No profits were being realized by sales wholesale. That essential activity of the subsidiary companies had disappeared altogether, and it was an essential activity in making the profits which would be charged with tax. All that was left of the activity of the subsidiary companies was the actual manufacturing, a thing which by itself produces no profits. On that basis this Court held that there had on the special facts of that case been no succession.

There was one argument advanced in that case to which I must refer, because much play has been made with it by the appellants in the present case. It was the argument put forward by the Crown to the effect that there ought to be

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(1) [1939] 2 K. B. 1.

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assumed for the purposes of applying the sub-rule a sale on wholesale terms from the factory to the retail side of the company's activities. That had a certain colour of plausibility in the fact that the company in its own departmental accounts had treated the matter as though there had been sales from the factory to the retail warehouse and a subsequent retail sale in the shops. That, of course, was, as was pointed out, a pure matter of convenience in accounting and did not reflect any actual transactions at all. But the use which counsel for the Crown endeavoured to make of it in argument was this: they said: " It is not correct to treat the business of manufacturing wholesalers as having come to an end because, "although in fact there are no sales wholesale at all, there "must be deemed to be sales wholesale as between the factory "and the retail warehouse." In other words, the argument involved setting up an imaginary sale in order to produce what was an essential element, the existence of which was necessary before any identity between the business before amalgamation and the business after amalgamation could be established—namely, the making of sales wholesale. That was the object of the argument, and it was held by this Court that it was not legitimate to introduce something so completely unreal and to invent a sale which never had, in fact, taken place, in order to keep alive for the purposes of the sub-rule a business which had, in fact, ceased to exist. In view of that case, this Court, as I have said, sent the present case back to the Commissioners, and it is from their finding that the present appeal originates.

The finding of the Commissioners is to be found in para. 3, of the supplement to the Case. They find " that the appellant "company did succeed to the trades of bar rolling and plating "formerly carried on by each of the subsidiaries on 7th April, "1934, and has continued to carry on such trades." That is their finding and, in so far as it is a finding of fact, it could not be interfered with by this Court unless this Court came to the conclusion that there was no evidence upon which it could be based. The Commissioners then go on to explain how it was that they came to that conclusion. They put to

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themselves a question formulated by myself in my judgment in the *Freeman, Hardy and Willis* case (1)—namely, " whether "or not it is true and fair to say that the business in respect "of which the successor is said to be making profits is the "business to which he succeeded." The Commissioners go on as follows : " We do not think that the fact that a purchaser "of a trade chooses to amalgamate that trade as a department "with his own prevents a succession if in other respects the "identity of the trade acquired is preserved. In the present "case we find that the identity of the trades formerly carried "on by the subsidiaries has been preserved. As we understand "it, we see no necessity for imputing any notional profit or "expense either to the steel works or to the plate works. The "appellant company produces these steel bars, not for re-sale "but for the purpose of its plate department. The profits "of the plate works of the appellant company is the actual "profit on the sale of plate—namely, the difference between "the actual sale price of plate and the actual cost of producing "plate through each process." Subject to one comment which I shall have to make later, I cannot find anything to quarrel with in the method of approach to the question which the Commissioners there set out. It seems to me that they have properly directed themselves and have come to a conclusion to which the evidence before them justified them in coming. But it is said that there was really no evidence upon which they could come to the conclusion to which they did come with regard to the succession to and the carrying on of these businesses. It was said that, in order to arrive at that conclusion, it was an essential element in the logical process involved to assume at one stage a notional sale of the steel bars out of which the tinplate was ultimately made. It was said that the business of the subsidiary companies could not be said to have persisted in a form identifiable for the purposes of the sub-rule, because, it was said, the businesses of the subsidiary companies had consisted in buying steel bars, subjecting them to the necessary processes and thereby producing tinplate. It was said, therefore : " There is no

(1) [1939] 2 K. B. 1.

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"longer within the four corners of what was acquired any "purchase of steel bars at all, and that essential element in "the businesses acquired having disappeared, it is impossible "to say that those businesses any longer exist, even for the "artificial purposes of the sub-rule, and the only method of "getting these businesses back into a state of existence is by "assuming the continuance of the missing part of their "operations—namely, purchase of the steel bars." I must confess that if that argument had been a tenable one, if the result flowed from the premises, it would have been a very attractive one, because it would have meant that the sub-rule could only be applied to the facts of the present case by assuming at the relevant stage a transaction which never in fact existed—namely, a purchase of steel bars. On that basis it was attempted to say that the observations made in the *Freeman, Hardy and Willis* case (1), on the subject of notional sales applied equally to the present case. In my opinion, that argument cannot be sustained. It is based on a proposition which I do not think is an accurate one; it is based on the proposition that the businesses acquired consisted of buying steel bars and then processing them in order to produce the finished article. In my opinion, that is a misleading description of the business. The way in which the business of the subsidiary companies was being carried on was, no doubt, by purchasing the half-finished material, which was the raw material of their own businesses. There would have been no difference in their business in any relevant sense if, instead of buying their steel bars, they had decided to start making them for themselves; it would merely have been a change in the method of providing themselves with the raw material out of which they manufactured the tinplates. On the facts of the present case, the steel bars are, of course, made by the appellant company, which is now the same company which turns them into plates. I myself see no difficulty in obeying the directions of the sub-rule without introducing at any stage any notional sale. The business with which the sub-rule is concerned is the business carried on by the predecessor. If one examines the facts of the present case, one finds that the appellants, who are the alleged successors, are doing every single thing which the subsidiary companies had previously done, from the steel bar stage; and from the point when the steel bar enters the tinplate branch of the business, the operations which take place are precisely the same, and the profits are ultimately made by the sale of the finished product. The only difference lies in the fact that the steel bar gets into the tinplate department not by a purchase from an outside body, but by a delivery from a different department of the appellants' works —namely, the department which makes steel bars.

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(1) [1939] 2 K. B. 1.

If the provisions of the section are to be carried out, and if the continued existence and identity of the businesses exist, what is the way in which the whole matter works out? Here it is important to bear in mind what I said earlier on, that the rule does not have the result of taxing profits which have never in fact been realized. The problem, therefore, is to arrive at the taxpayer's profit in accordance with the section, and anything in the shape of a notional sale must be rejected if that would involve ascribing to the taxpayer a profit which he has never earned. If a notional sale is to be assumed, it would work in that way. The problem being to ascertain the taxable profits of this taxpayer, a certain part of his profits falls to be dealt with in the artificial way provided by the sub-rule, and the rest of his profits falls to be dealt with in the ordinary way. Now, if we are to say that the matter must be treated as though the appellant company had sold to the tinplate part of its business the steel bars which it makes in the steel bar part of its business at a profit, the result in practice would be this, that the part of the profits referable to the businesses acquired would be ascertained on the footing that those parts of the business had acquired their raw material at a particular price, which in fact, of course, they had not. With regard to the rest of the profits of the appellant company, they would fall to be treated as though the appellant company had sold at a profit products, namely, their steel bars. to their own tinplate

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departments, which, of course, they had not; and if that were the basis upon which the thing worked, the result would be to bring into charge to tax profits which had not been earned at all.

The solution, in my judgment, is along different lines. It seems to me that the businesses acquired may properly, for the purposes of the sub-rule, be treated, and should be treated, as beginning at the steel bar stage—namely, the stage when those branches of the business procure for themselves a steel bar. Obviously in order to arrive at profits of those branches of the business on that basis, some figure must be brought into account to represent the cost of the steel bar. If that figure is based on an imaginary sale price at a profit, it is an unreal figure. If, on the other hand, it is brought in at the actual cost of producing that steel bar, it is a real figure; and treating—as we are bound by the rule to do—the two parts of what is in truth one business as though they were held apart, the only way in which, in my judgment, that direction can logically be carried out is the way that I have indicated, of bringing in the raw material, namely, the steel bar, at the actual cost of production. If that is done, it fits in exactly with the fact that, by reason of the amalgamation, the appellant company has lost six customers, because whereas it had previously been manufacturing with a view to selling to six customers, it is now manufacturing with a view to passing on to its tinplate department, without any profit to itself, something which it has manufactured in the other part of its concern.

Now, it seems to me that that solution of the difficulty is the proper solution; it is in accordance with the language of the sub-rule, and it involves no assumption of a notional sale. But it does involve this, that the cost of making the steel bars for these various acquired businesses must be ascertained. With regard to that, there appears to me to be no difficulty whatsoever in principle. There may be very serious difficulties in ascertaining the proper figure, but those are matters with which accountants are familiar, and with which they have to deal every day. Something was said about

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that class of operation in my judgment in the *Freeman, Hardy and Willis* case. (1) The accountant's task would be to ascertain by proper methods and proper apportionment what the cost of production of the bars was, including, of course, overheads, and all other things which have to be apportioned. The effect of that operation is not to invent some artificial and unreal process, such as a sale, but to ascertain what is a reality—namely, the cost of producing a particular article, wrapped up though that reality may be in a number of difficult problems of accountancy. Nevertheless, the figure of cost of the article down to that stage is a real figure, and can be ascertained ; there is nothing notional, imaginary or fictitious about it.

There is another way of arriving at precisely the same result, and it is this. It may be said that the appellant company should be regarded as carrying on the businesses acquired, but as having modified them or altered them by substituting for a purchase of the raw material a manufacture of it for themselves. That, as I have said, leads to precisely the same result. Speaking for myself, I prefer the other method of arriving at the result, for the reason that this latter method is one which involves the consideration of a problem of fact of a rather different character, because it is necessary to treat the business carried on after the amalgamation as a business of producing steel bars and turning them into tinplate. Such a business is arrived at at the expense, so to speak, of the original business of the company which, on that basis, must be treated as having given up pro tanto that particular branch of its activities. Whether or not in a given case on that way of looking at it the Commissioners would come to a conclusion of fact on the identity of the business might present more difficult problems in future cases, it seems to me, than if the matter be approached in the way that I first indicated—namely, by treating the original business as continuing but as not making profit out of those steel bars which it passes on to the branches which represent the businesses acquired.

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(1) [1939] 2 K. B. 1.

The learned Attorney-General suggested, but did not really strenuously argue, that the proper method was to ascertain the profits on the basis of a notional sale. When the matter was discussed in the course of argument, he did not wish to press that argument, and the reasons why, in my judgment, it is not sustainable, I think, sufficiently appear from what I have already said.

There is only one further matter to which I need refer, and that is the question of scrap. That arises in this way: Before the amalgamation, the subsidiary companies used to sell back to the appellant company the scrap which came into existence in the process of cutting and rolling out the steel bars into blackplate. The subsidiary companies sold that scrap back; it was used by the appellant company in the same way as it used the other scrap that it bought; in other words, the scrap went back into the mill and emerged finally in the form of other steel bars. As the result of the amalgamation, the businesses acquired no longer conduct the activity of selling scrap; that particular activity has come to an end; but the effect of that happening is not one which must necessarily have the result of forcing the Commissioners to say that the business of the subsidiary companies has come to an end. The sale of that scrap was a subsidiary part of those businesses, and the fact that it is no longer done cannot, in my judgment, affect the question as to whether there is or is not a succession. Another argument is raised in connection with the scrap, and it is this: it is said that, whatever be the case with regard to the other inter-departmental transactions, in the case of the scrap you must assume a notional sale; otherwise you never can arrive at any proper result in figures at all. I listened carefully to that argument, and I hope that I understood it, but I am afraid that I cannot accept it. It seems to me that the position of the scrap is perfectly simple, and falls into line exactly with what I have already said on the main matters in the case. Since the amalgamation, the tinplate branches of the appellants' business produce, each of them, in the course of their operations, what may be called a by-product—namely, scrap. That scrap is something which has a value. Previously the subsidiary companies sold it; now it is not sold; nevertheless it is a valuable thing produced in the course of their operations. What in fact happens to it is that, together with the scrap produced by the other branches representing businesses which have been acquired and other raw material bought outside by the appellant company, it goes back, so to speak, into a common pot, and out of that common pot further steel bars are produced which find their way to the tinplate branches of the business. The proper method of dealing with that scrap so produced, in the light of those facts, appears to me to be quite a simple matter; and it seems to me a perfectly simple matter to ascertain, on the basis which the rule directs, the profits of these acquired businesses without introducing any element of notional sale of scrap at all. In other words, the existence of that scrap has the result of reducing the cost of producing the next lot of steel bars, and that reduction of cost would be reflected in the cost price of the next lot of steel bars. I see no difficulty in the matter at all.

The only thing which remains for me to say is this: I have indicated what, in my opinion, is the strict method of applying this section to a case like the present, which does not involve any notional sale at all or any notional profit realized inter-departmentally. But it is right to say that I understand that in the present case the figures have been agreed on the basis that the profits of these businesses taken over are, for the purposes of the sub-rule, to be ascertained as a matter of figures on the basis of the inter-departmental sales which, for their own convenience, the appellants treat in their accounts as having taken place. In many cases it may be very convenient, both for the Crown and for the taxpayer, to adopt some such rough and ready method as that for arriving at the result, and nothing that I say must be taken as in any way precluding the parties from arriving at an agreed result without going through what may, in many cases, be an expensive and difficult process raising, perhaps, matters of controversy—namely, of ascertaining

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the sum which should be treated as being the cost of the steel bar, as it is in this case, or whatever else it may be in other cases. Sensible people will, no doubt, endeavour to avoid unnecessary expense if, by so doing, they can reach a satisfactory and just result.

It was essential, for the purposes of this judgment, to ascertain what the true and proper course under the sub-rule is, because that is a necessary step in the whole process of reasoning which must be gone through in order to appreciate the proper application of the sub-rule to facts such as these.

In the result the appeal fails, and must be dismissed with costs.

SCOTT L.J. I agree.

CLAUSON L.J. I agree.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors : *Ingledew, Sons & Brown, for Crawfords, Swansea ; Solicitor of Inland Revenue.*

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ROUSE *v.* GRAVELWORKS, LIMITED.

[1938. R. No. 139.]

Easement—Support of land—Trespass—Owner of land quarrying gravel therein—Quarried area extending to near boundary of adjoining land—Accumulation of water in quarried area—Injurious affection of adjoining land—Loss of material—Weakening of support—Injury to surface and to crops thereon—Effect of natural agencies—Cause of action by adjoining landowner—Costs—Unreasonable claim by plaintiff—Recovery of part—Discretion to order plaintiff to pay defendant's costs.

Boundary—Hedge and ditch—Presumption—Rebuttal.

The plaintiff, a farmer, owned a field which he cultivated from year to year. The defendants owned adjoining land containing gravel which they excavated in the course of their business as gravel merchants. The excavated area, which approached close to the boundary of the defendants' land, became filled with water by rain and percolation, thus forming a pond or mere. The water of the mere by erosion of the shore and by being blown against it by wind removed some material from the plaintiff's field, deprived the field to some extent of lateral support, and prevented the plaintiff from making a profitable use of a narrow strip of his field adjoining the mere. In an action by the plaintiff against the defendants claiming damages for the injury and loss which he thus sustained and would sustain :—

Held, by the Court of Appeal, reversing the judgment of Cassels J., that the plaintiff had no cause of action, inasmuch as the defendants had a legal right to excavate the gravel on their land, and the accumulation of the water in the excavation and its effects upon the plaintiff's field were caused not by the direct action of the defendants, but by the natural agencies of rain, percolation and wind over which the defendants had no control and for which they were not responsible.

Wilson v. *Waddell* (1876) 2 App. Cas. 95 followed.

Hurdman v. *North Eastern Ry. Co.* (1878) 3 C. P. D. 168 distinguished, but principle applied.

Giles v. *Walker* (1890) 24 Q. B. D. 656 ; and *Brady* v. *Warren* [1900] 2 Ir. R. 632, applied.

A plaintiff who maintains an extravagant and unreasonable claim, even though he may recover some part of it, may be ordered to pay the whole of the defendant's costs.

Gray v. *Lord Ashburton* [1917] A. C. 26 applied.

Held, by Cassels J., at the trial of the action, that the presumption, that where a hedge and ditch pass along the boundary between two adjoining properties the boundary line is to be found on the side of the ditch furthest from the hedge, is rebuttable, and is

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rebutted by production of the title deeds of the properties showing by reference to the ordnance survey map that the boundary is the middle line of the hedge.

Fisher v. *Winch* [1939] 1 K. B. 666 followed.

Appeal from the judgment of Cassels J. in an action tried by him without a jury at Lincolnshire Assizes.

In 1920 Mr. Albert Rouse, a farmer (hereinafter called the "plaintiff"), purchased for 700*l.* a piece of land in the parish of Baston in the county of Lincoln, containing upwards of nineteen acres, numbered 224 on the ordnance survey map comprising the said parish, to hold to his use in fee simple, and had ever since been the owner and occupier thereof, cultivating it as an arable farm year by year.

In 1933 a company, known as Gravelworks, Ld. (hereinafter called the "defendants"), purchased for 494*l.* a piece of land in the aforesaid parish and county, containing about eleven acres, numbered along with another piece of land 226 on the said map, to hold unto them in fee simple, and they had ever since been the owners and occupiers thereof. The defendants' land was bounded on its southern side by the said land of the plaintiff.

The defendants' said land contained gravel which they excavated in the course of their business. The excavated area at length extended over a large part of that land and approached close to the boundary between it and the plaintiff's land, and by rain and percolation it became filled with water, thus forming a pond or mere.

The plaintiff complained that the defendants' excavations and the water in the mere had caused and would continue to cause damage to his land, and negotiations thereupon took place between the parties.

By a letter dated April 19, 1938, the defendants' solicitors wrote to the plaintiff's solicitors stating that it appeared that as a result of the combined action of wind and water working from the defendants' side of the boundary hedge the plaintiff's soil had been eaten into for from two feet to two inches in some four or five places; that it would seem probable that it was the defendants' duty to fill up the small gaps in question and to compensate the plaintiff for such loss, if any, as he might have suffered; and the defendants proposed that at a time and in a manner convenient to the plaintiff they should fill up the gaps, or that they should purchase a strip of land, say ten feet in width, on the plaintiff's side, at the price previously suggested by the plaintiff of 75*l.* an acre; and that the defendants were anxious to deal with the matter in such a manner as to avoid the possibility of the plaintiff having any grievance therein.

By a letter dated July 28, 1938, the plaintiff's solicitors stated that the plaintiff declined to sell a strip of his land and repeated a previous offer of theirs to sell to the defendants the whole of their said piece of land approximately for 2000*l.*

In November, 1938, the plaintiff brought the present action against the defendants, alleging in his statement of claim that in the course of their excavations the defendants had worked beyond or up to or so close to the boundary of the plaintiff's field; that they or the water which had accumulated in the area excavated had removed and taken away quantities of earth, sand and gravel from the plaintiff's field; that the defendants had thereby wrongfully encroached upon the plaintiff's land in the said field and had wrongfully caused the remainder of the field to be deprived of the lateral support which it naturally had; that by their work as aforesaid and by reason that the defendants had taken no steps to counteract the action of the water the plaintiff's field was continually being taken away and the plaintiff was the less able to make a profitable use of the remainder; that by reason of the aforesaid wrongful acts and neglect of the defendants the plaintiff had suffered damage, and would continue to suffer further and increasing damage, unless and until adequate steps were taken to stop the encroachment on the plaintiff's land, the boundary thereof adjoining the defendants' land would have to be made up and secured by the erection of a barricade; and the plaintiff claimed damages from the defendants for wrongfully causing earth, sand and gravel to be taken away from his field, for wrongfully withdrawing lateral support from the plaintiff's land, and for depriving the plaintiff of the profitable use of the remainder thereof.

As to the boundary between the lands of the parties, the plaintiff said in particulars under his statement of claim, and afterwards in evidence that a piece of hedge running substantially east and west on the north side of his land marked the line of a former bank of earth, that to the north of the bank there had been a ditch, and that the north side of the ditch, four feet to the north of the hedge, was the boundary; according to which view the defendants' actual excavations had at certain places encroached substantially on the plaintiff's land.

In January, 1939, the defendants delivered their defence and counterclaim in which they stated that they denied the above allegations of the plaintiff and denied that the boundary was as stated by the plaintiff and said that it was the middle line of the hedge; that in the alternative if the plaintiff's field was being taken away, or earth, soil or gravel had been taken away, the taking away was not caused by matters over which the defendants had any control or for which they were responsible; that in the further alternative the plaintiff had caused or contributed to the matters complained of by his own acts by having burned down the hedge and burned the roots thereof thereby reducing the binding power of the soil and rendering it friable; and the defendants counterclaimed a declaration that they were the owners in fee simple of the parcel of land four feet in width lying north of the hedge.

The defendants paid *75l.* into Court.

The action was tried on June 19, 20 and 21, evidence being given on both sides. The plaintiff said, among other things, that owing to the withdrawal of support he could not plough a strip of his land near the boundary by means of a tractor, but only by horses which were more expensive.

On the last mentioned date Cassels J. gave judgment, in the course of which he said that the first question was as to the boundary between the lands of the plaintiff and the defendants. The plaintiff said that there was between his field and the defendants' field a hedge, and on the defendants' side of the hedge a ditch, and that the boundary was a line four feet beyond the centre of the hedge on the other side of the ditch.

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On the evidence his Lordship was not satisfied that the ditch actually existed and he held as a fact that it did not ; and that finding disposed of the plaintiff's contention that his land extended four feet beyond the centre line of the hedge. But even if the ditch had existed the plaintiff would still fail upon this point. His title was derived from a conveyance which referred to an ordnance map. It was agreed by both parties that the boundary line there shown was the centre line of the hedge. It was a presumption and only a presumption that where there was a hedge and a ditch the boundary line was to be found on the furthest bank of the ditch. That presumption was rebuttable by the production of the title deeds, and, in this case, the title deeds clearly showed by a particular reference to the ordnance survey map the position of the boundary line on the middle line of the hedge. Reference might be made on this point to the recent decision in *Fisher* v. *Winch.* (1) His Lordship found, however, that there had been an encroachment by water on the plaintiff's side of the boundary, that the plaintiff had lost some, though not much, sand and gravel, that he would not be able by ordinary means to cultivate a strip of his field inside the boundary amounting in all to about a quarter of an acre, and that he had lost a part of his 1938 barley crop on that field ; and he held that the plaintiff had suffered appreciable loss and had a good cause of action for damages and he ordered that judgment be entered for the plaintiff on the claim for 75*l.*, being as to 40*l.* thereof damages down to the date of assessment and as to 35*l.* thereof for future damage, with costs of the action in respect of the issue of liability ; and adjudged that there be no order as to the costs of the issue of damages, and ordered that judgment be entered for the defendants on the counterclaim for the declaration for which they asked with costs of the counterclaim, and that the 75*l.* in Court be paid out to the plaintiff.

The defendants appealed against the judgment, except in so far as it fixed the boundary between the properties and determined the counterclaim in favour of the defendants. The appeal was heard on December 7, 8, 11, 1939.

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(1) [1939] 1 K. B. 666.

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M. Dunbar Van Oss for the defendants, appellants. Cassels J. was wrong in holding that the plaintiff had any right of action against the defendants. He decided that the boundary between the lands of the respective parties was that alleged by the defendants, namely, the line of the hedge, and not that alleged by the plaintiff, namely, a line four feet to the north of the hedge. Against that part of his judgment there is no appeal, and therefore the boundary must be taken to be the line of the hedge. If the water on the defendants' land has caused any damage or will cause any future damage to the plaintiff's land, the defendants are not in law liable for that damage. It is conceded that a landowner has a right of support for land in its natural state as against a neighbouring landowner: *Dalton* v. *Angus* (1) and *Backhouse* v. *Bonomi.* (2) It appears, however, that the question whether land is being used in its natural state is one of degree, and it may be doubtful whether land which, like that of the plaintiff, is ploughed by a tractor is in its natural state. As against the right of the plaintiff to support for his land there is another principle which operates in favour of the defendants, namely, that every owner of land has a right to the natural user of his land, including the right to extract minerals from it. Where a landowner in the course of the natural user of his land extracts minerals therefrom, without actually encroaching on neighbouring land, but the effect of his operations is to interfere with the support or user of that neighbouring land, he incurs no liability: *Wilson* v. *Waddell* (3); and per Lord Cairns L.C. in *Rylands* v. *Fletcher.* (4) The principle is not limited to cases between neighbouring mineowners: see *Hurdman* v. *North Eastern Ry. Co.* (5) An interference with a right to support, to be actionable, must be direct and not through the intervention of some natural agency. Therefore, where, as here, a landowner in the natural course digs minerals and water comes naturally into the excavations and by perculation or erosion interferes with the support or user of adjoining land, the landowner is not liable, because the interference is not caused by his direct action but by the intervention of natural agencies. Further, the person who claims that his right of support or enjoyment of his land has been affected has no right of action unless he can show that he has sustained some actual damage: see *Backhouse* v. *Bonomi* (1); and *Smith* v. *Thackerah*. (2) Here the plaintiff has suffered no damage or at all events no appreciable damage. It does not appear that the support of his land has been interfered with. There is no evidence that it would be dangerous or more expensive for him to plough the margin of his land by means of horses. The defendants offered to make good to the plaintiff any damage that had been done to his land, but the plaintiff refused to accept the offer except on impossible terms. Future damage, if any, will be slight, as erosion of land by a pond causes the formation of a beach which soon attains an angle of repose giving effective support to the adjoining land. The learned judge did not properly assess the damages. The sum of 40*l.* was too much to award for the damage, if any, already done, and it does not appear that any future damage would amount to 35*l.* The judge was wrong in ordering the defendants to pay the whole costs of the action. The defendants had paid into Court a sum equal to the amount for which judgment was given, and, at most, they ought only to have been ordered to pay costs up to the time of payment into Court.

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(1) (1881) 6 App. Cas. 740, 792.
(2) (1861) 9 H. L. Cas. 503.
(3) (1876) 2 App. Cas. 95.
(4) (1868) L. R. 3 H. L. 330, 338.
(5) (1878) 3 C. P. D. 168.

S. H. Granville-Smith, for the plaintiff, respondent. Cassels J. rightly decided in favour of the plaintiff. The plaintiff has a good cause of action against the defendant in the nature of trespass and is entitled to damages. His cause of action arises from the actual depreciation in value of part of his land by reason of the action upon it of the water which the defendants have suffered to accumulate upon their land, the particular injuries being the removal of material from the plaintiff's land, the encroachment upon his right of support for his land, and the interference with the use of his land for cultivation or any other purpose: *Clegg* v. *Dearden* (3);

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(1) 9 H. L. Cas. 503.
(2) (1866) L. R. 1 C. P. 564.
(3) (1848) 12 Q. B. 576.

Darley Main Colliery Co. v. *Mitchell* (1); and *Trinidad Asphalt Co.* v. *Ambard.* (2) The damages recoverable are not limited to the actual damage suffered at the time of the action, but extend to future damage which cannot be exactly foreseen at that time: see *Darley Main Colliery Co.* v. *Mitchell* (1) per Lord Blackburn (3); *Stollmeyer* v. *Trinidad Lake Petroleum Co.* (4); and *Wood* v. *Conway Corporation.* (5) A person who collects or accumulates water on his land, as the defendants have done, is bound to keep it there, and, if he allows it to escape and do damage, he is liable: *Rylands* v. *Fletcher* (6); Salmond on Torts, 9th ed., p. 584. An exception to that rule of law has no doubt been established in the case of water escaping by natural gravitation from an upper to a lower mine: *Smith* v. *Kenrick* (7); *Baird* v. *Williamson* (8); and Salmond on Torts (supra); but this case is not within that exception.

Van Oss in reply. This is not an action of trespass: see Clerk and Lindsell on Torts, 9th ed., p. 403. The case of *Clegg* v. *Dearden* (9) does not apply, because there the defendant mineowner made an aperture by which the water escaped on to the plaintiff's land.

SLESSER L.J. The plaintiff, Albert Rouse, and the defendants, Gravelworks, Ld., are neighbours. Gravelworks, Ld., as their name implies, carry on the business of acquiring land and then quarrying it by open digging for the purpose of getting out gravel. The plaintiff is a farmer, and is the owner and occupier of a field adjacent to that in which the defendants have for some years been excavating gravel. In the course of the defendants' work the excavations came quite close to the boundary of the plaintiff's land; and the plaintiff said that in fact they had worked right over the boundary of his land, and had actually taken from his land certain gravel, depriving the land of support, and preventing some of it from being available for agricultural user. On that matter a dispute arose between the plaintiff and the defendants as to the exact boundary of the land, there being a strip of land some four feet wide between the boundaries alleged by the respective parties. Had the boundary for which the plaintiff contended been the true boundary, his case on this head would have been without answer, and the only matter which would have remained would have been to assess the damages. But the question as to the boundary was adjudicated on by the learned judge at the trial, and he held that the boundary between the two lands was where the defendants and not where the plaintiff contended it was; and there is no appeal from that part of his judgment.

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(1) (1886) 11 App. Cas. 127.
(2) [1899] A. C. 594.
(3) 11 App. Cas. 127, 136.
(4) [1918] A. C. 485, 492, 497.
(5) [1914] 2 Ch. 47, 56.
(6) L. R. 3 H. L. 330.
(7) (1849) 7 C. B. 515.
(8) (1863) 15 C. B. (N. S.) 376.
(9) 12 Q. B. 576.

The case thus comes before us on the basis of the defendants' boundary being the boundary. Upon that basis certain facts appear and certain considerations arise which really are not in dispute. Thus, on the basis of that boundary, it is now not contended that the defendants have directly, by any action of their own, by their gravel grab or digging, dug away any of the plaintiff's land. But what is said is that the defendants have admittedly dug their gravel, and have created almost up to the plaintiff's boundary a mere of water, over which the winds blow and will blow; that those winds have already blown the water on to the plaintiff's land; and that the water has already by erosion forced the disappearance of some gravel from the plaintiff's land. That gravel only amounted to, I think, some five cubic yards, and is estimated at the value of 7*s.* 6*d.*, an estimate which makes it quite clear that the damage is absolutely insignificant in amount. It is important to say that, at the time when the action was tried, that was in fact the only gravel which had been taken away by this erosion caused by the wind blowing over the water. It was said, however, at the hearing that further damage is bound to follow; that this erosion will continue until the gravel reaches a certain angle of inclination which is a matter of mechanical ascertainment and really not in dispute; and that when the gravel reaches that angle of repose, there will be a strip of the surface some twelve feet in breadth, in all about a quarter of an acre, which will have been to some extent done away with, owing to the position of this angle, and will not be suitable for agricultural use, though still, of course, it may be used by the plaintiff himself for the extraction of gravel.

The defendants say that whatever may be the rights of the plaintiff, either at the time of action brought or the future rights which he may acquire, there is here disclosed no cause of action at all, since in law what the defendants have done is consistent with no more than the natural user of their land. They say that every freeholder has the right to work his minerals; and that they have done no more than work their minerals. If water has accumulated on their land in consequence of that working, and if some of that water has escaped on to the land of the plaintiff, albeit in the form of waves beating on his land, they contend that they have committed no wrong against him, and cannot be held liable for having deprived him of the lateral support to which he, as freeholder, is entitled. Their position is that they have done no more than use their land in the natural way, and that the plaintiff can point to no grant, or prescription, which gives him any right to be protected from the consequences of the natural user of their land, and cannot maintain any case against them for loss of lateral support.

A number of authorities were quoted to us on this matter by Mr. Van Oss. Perhaps the most conclusive for this purpose is *Wilson* v. *Waddell.* (1) That case laid it down that the owner of minerals has the right to take away the whole of what is in his land, according to the natural course of user. Lord Blackburn said (2) this: "The general rule of law in "both countries is that the owner of one piece of land has "a right to use it in the natural course of user, unless in so "doing he interferes with some right created either by law or "contract; and as a branch of that law, the owner of the "minerals has a right to take away the whole of the minerals "in his land, for such is the natural course of user of minerals; "and that a servitude to prevent such an user must be founded "on something more than mere neighbourhood." I pause to say that I think in the present case the complaint as founded is a complaint on mere neighbourhood. Lord Blackburn goes on to quote the opinion of Lord Cairns L.C. in *Rylands* v. *Fletcher* (1): "The occupiers of a close might lawfully have "used that close for any purpose for which it might in the "ordinary course of the enjoyment of land be used; and if "in what I may term the natural user of that land there had "been any accumulation of water either on the surface or "underground, and if by the operation of the laws of nature "that accumulation of water had passed off into the close "occupied by the plaintiff, the plaintiff could not have "complained that that result had taken place." The learned Lord Chancellor then, I think, was speaking primarily of the case of water passing on by seeping, or by underground channel, or by watercourse: but I can see no distinction between accumulation of water passing by watercourse or by seeping, and the case of water being blown by the wind, albeit in a battering form, upon any person's land. The position seems to me to be the same in all such cases. In any of them it may be that the lateral support of the neighbouring land would be destroyed: but in none of them could it be properly said that the responsibility for the destruction was that of the person who had used his land naturally, because the water had been an element upon which nature had played to destroy the natural lateral support of the plaintiff's land.

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(1) 2 App. Cas. 95.

(2) Ibid. 99.

It has been indicated in argument that this principle ought to be applied only as between one mine-owner and another. For myself, I can see no reason for coming to that conclusion. If the right view be that a neighbour cannot complain because the person alleged to have injured him has been putting his land to a natural use, I cannot see what difference it makes whether that neighbour is himself a mineowner or is not. But if there be any doubt on the matter, I think the case *Hurdman* v. *North Eastern Ry. Co.* (2) makes it quite clear that the principle is one of general application. There it was held there had been an artificial erection on some land which had caused water to flow into the plaintiff's land;

(1) L. R. 3 H. L. 338.

(2) 3 C. P. D. 168.

and, therefore, on the principle of *Rylands* v. *Fletcher* (1) the defendant was held responsible. It was equally clear, from the way in which the case is put in the judgment, that, had there been no such artificial erection, the judgment would have gone the other way. Cotton L.J., in delivering the judgment of the Court of Appeal, said (2): "Every "occupier of land is entitled to the reasonable enjoyment "thereof. This is a natural right of property, and it is well "established that an occupier of land may protect himself "by action against any one who allows any filth or other "noxious thing produced by him on his own land to interfere "with this enjoyment. We are further of opinion that, "subject to a qualification to be hereafter mentioned, if "any one by artificial erection on his own land causes water, "even though arising from natural rainfall only, to pass into "his neighbour's land, and thus substantially to interfere "with his enjoyment, he will be liable to an action at the "suit of him who is so injured, and this view agrees with "the opinion expressed by the Master of the Rolls in the "case of *Broder* v. *Saillard*. (3) I have limited this statement "of liability to liability for allowing things in themselves "offensive to pass into a neighbour's property, and for causing "by artificial means things in themselves inoffensive to pass "into a neighbour's property to the prejudice of his enjoyment "thereof, because there are many things which when done on "a man's own land (as building so as to interfere with the "prospect, or so as to obstruct lights not ancient) are not "actionable, even though they interfere with a neighbour's "enjoyment of his property. But it is urged that this is at "variance with the decision that if, in consequence of a mine-"owner on the rise working out his minerals, water comes by "natural gravitation into the mines of the owner on the deep, "the latter mine-owner cannot maintain any action for the "loss which he thereby sustained. But excavating and raising "the minerals is considered the natural use of mineral land, "and these decisions are referable to this principle, that the

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(1) L. R. 3 H. L. 338.
(2) 3 C. P. D. 168, 173.
(3) (1876) 2 Ch. D. 692, 700.

"owner of land holds his right to the enjoyment thereof, "subject to such annoyance as is the consequence of what is "called the natural user by his neighbour of his land, and "that when an interference with this enjoyment by something "in the nature of nuisance (as distinguished from an interruption or disturbance of an easement or right of property in "ancient lights, or the support for the surface to which every "owner of property is entitled), is the cause of complaint, no "action can be maintained if this is the result of the natural user "by a neighbour of his land. That this is the principle of these "cases appears from the case of *Wilson* v. *Waddell* (1), and from "what is said by the Lord Chancellor in *Fletcher* v. *Rylands*. (2)"

If that view which I have expressed be correct, it of course concludes this case in favour of the defendant: because all the complaints made here, whether they accrued before the action was brought or were anticipated in the future, or were of one order or another, are complaints for none of which the defendants are responsible. This case was decided by the learned judge upon the assumption that the defendants were responsible for their alleged wrongful acts, an assumption which, as I have indicated, is wrong.

I do not think it would be right to leave this case without expressing the view that, even had I thought the defendants responsible, I, for one, am quite unable to understand the principles upon which the learned judge assessed the damages. One thing is clear, though the judgment on the face of it was for 75*l.*, the learned judge was of opinion that, as the law stood, he could only assess the damages as to the cause of action which had accrued at the time of action brought, and these damages he assessed at 40*l.* Mr. Van Oss being careful to preserve his right to contend, as he has successfully contended in this Court, that he was under no obligation at all to the plaintiff, it appears that both parties did agree, subject to that condition, that if the defendants were liable at all, the learned judge should assess the remaining damage which it might be anticipated the plaintiff would have sustained when the gravel had reached the angle of repose and that damage he assessed at 35*l.* I assume that he assessed it as an arbitrator because it was clearly a matter that he had no power to assess by way of judgment, the damage having not yet accrued, and this being an action on the case. As regards the 40*l.*, excluding the insignificant claim for 7*s.* 6*d.* for gravel actually washed away by the operation of wind of which I have already spoken, the only evidence that the plaintiff had suffered any damage at all was that he said as regards the said quarter of an acre of land—I am not very clear whether it was the whole of it, or only a part of it—that he was unable to plough it with a tractor, and could only plough by means of horses ; alleging generally, without giving any particulars at all, that the tractor method would be the cheaper. The learned judge appears to have forgotten in his judgment that there was the alternative and efficacious method of ploughing by horses admittedly open to the plaintiff at the time when the action was brought. So far as the photographs show, the plaintiff actually did plough right up to the edge of the land. How the learned judge arrived at damages of 40*l.* in these circumstances, it is very difficult to understand.

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(1) 2 App. Cas. 95.
(2) L. R. 3 H. L. 330, 338.

I say nothing about the correspondence which preceded action in this case, except that it displays on the part of the defendants most reasonable and courteous attempts to arrive at a settlement ; and on the part of the plaintiff a complete obduracy followed by an attempt almost to exploit the situation in favour of his receiving more than the defendants were willing to pay for this land. But all that, of course, is a matter that we have not here to consider.

I am of opinion that the plaintiff fails to establish any right of action against the defendants for damages even of a nominal character ; and that this appeal should, therefore, be allowed. We can deal with the question of costs when my brothers have given their judgments.

MacKinnon L.J. I agree that the plaintiff's cause of action quite clearly was a claim that the defendants had impaired that right of support of the plaintiff's land which, as a neighbouring landowner, he was bound to give. I think the proper answer of the defendants to that is that they have only used their land as they are entitled to use it, by digging out the mineral; that when they had dug out the mineral, they had not in any way impaired the plaintiff's right of support, his land being as much supported as he was entitled to require; that subsequently nature intervened, whereby water accumulated in the defendants' land and wind blew upon it, the effect of the natural operation of wind and water being to erode the edge of the plaintiff's land; that the defendants are not liable for that process, because it is the result of the operations of nature, for which their rightful use of their land may have given the occasion, but for which they are not responsible as having caused it. The result of that reasoning is, in my view, that (I need not repeat what has been said by my Lord) the plaintiff fails to establish his cause of action.

As regards the judgment of the learned judge below, I entirely agree with what has been said by my Lord. I am unable to understand how the learned judge arrived at 75*l.* as the total damage which the plaintiff sustained, when the maximum result ever to be contemplated in this case was that he would lose possession of a quarter of an acre of land, which it is suggested would ultimately be washed away by the water. As the freehold value of that quarter of an acre was at the outside, at an excessive figure, put at 25*l.*, it is a complete mystery to me how it can be said that 75*l.* in any circumstances could have been regarded as the proper amount of damages.

Finally, I venture to make this further observation. The defendants paid 75*l.* into Court; and, not unnaturally, they asked to have the costs of the action after payment in. But the plaintiff said that he ought to have the costs of the issue of liability. The learned judge, in one passage of his judgment, says: "I am not prepared to say that the plaintiff acted "unreasonably in going on"; and, therefore, he thought he ought to have his costs of establishing liability. For my part, I do not think I have ever known a case in which a plaintiff acted more unreasonably than in continuing this litigation after the defendants had paid 75*l.* into Court, especially bearing in mind the fact that the defendants had opened negotiations with the plaintiff, long before the writ, by their solicitors' letter of April 19, 1938, which is as reasonable a letter by one neighbour to another as I have ever read, offering the most complete satisfaction that the plaintiff could possibly expect to receive.

It is not necessary, in the view we have taken of the case, to go further. I may say, however, that at a very early stage in this case I was satisfied that the result of this appeal must be to cut down the damages very extensively, and to make a very drastic alteration in the order as to costs in the Court below. But as the case has developed in argument, I agree that the appeal should be allowed, and judgment entered for the defendants with costs in this Court, and in the Court below.

GODDARD L.J. I agree. In my judgment the plaintiff had no cause of action. This is not a case in which a defendant has introduced something on to his land which has escaped or done damage. It is a case in which he was exercising what has always been regarded in English law as the normal right of a landowner, the right to excavate minerals. Having excavated the minerals on his land, the space formerly occupied by the minerals became filled up with water, partly from underground places, I suppose, and partly from surface water. The result was the formation of a lake, which was on the land as naturally as a lake which is formed by a river flowing into a confined space, or a river itself. The water was naturally on the land. It is said that the action of the water has been to erode or undermine the neighbouring bank of the plaintiff. It is quite obvious in this case that an action for trespass would not lie. The only question would be whether there was an action on the case. Mr. Granville-Smith has argued very strenuously that this is a case of withdrawal of support, just in exactly the same way as though in the quarry, through working the gravel, the defendants had withdrawn the support to the plaintiff's land. Here the support was not withdrawn through the defendants working the gravel, but through the action of water and the action of water as it was affected by the wind.

It seems to me that when the case is properly understood, the position is exactly the same as in the well known case of *Giles* v. *Walker* (1), where an owner of land was held not liable because he allowed thistles to grow on his land and thistledown to escape; or the equally well known Irish case of *Brady* v. *Warren* (2), in which, following the rule of the English Courts in *Smith* v. *Kenrick* (3), an owner was sought to be held liable for allowing an accumulation of rabbits on his land, which escaped. In such cases the act complained of is a purely natural act. If the landowner is not liable for the actual escape of water naturally on his premises, as is shown by the judgment of the Lord Chancellor in *Rylands* v. *Fletcher* (4) and by the judgment in the well known case of *Wilson* v. *Waddell* (5), and other cases of that nature, it seems to me impossible to say that the defendants in the present case are responsible for water which they have not themselves brought on to the land, but which is there naturally, or for any damage which that water may cause.

Like my Lords, I want to say one word with regard to the course taken by the learned judge in this action with regard to costs, assuming for the moment that the plaintiff had been entitled to the 40*l*., or even the 75*l*. that was awarded. The substance of the question that was litigated in this case was where was the boundary between the lands. On that question the plaintiff's case failed. He was claiming that the boundary was much further over on what I may call the defendants' side than it was found to be. The counterclaim by the defendants with regard to the boundary succeeded. The plaintiff not only failed on that part of his case, but he brought an action claiming between 500*l*. and 600*l*. damages for an alleged injury for which the learned judge awarded 40*l*. The defendants had paid into Court 75*l*. In view of that payment in, it is somewhat of a surprise to me that the learned

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(1) (1890) 24 Q. B. D. 656.
(2) [1900] 2 Ir. R. 632.
(3) 7 C. B. 515.
(4) L. R. 3 H. L. 330.
(5) 2 App. Cas. 95.

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judge hesitated for one moment with regard to the costs. If in those circumstances the plaintiff is to have any costs after the date of payment into Court, I think one might just as well delete from the Rules of Court the rule dealing with payment into Court. If ever there was a case in which the plaintiff should be mulcted in costs for having continued his action without good cause, this is that case. Indeed, if I had been trying the case, I think I should have gone further. It is well established that if a plaintiff, to use Lord Atkinson's language, maintains an extravagant and unreasonable demand, he may be ordered to pay the whole of the defendant's costs, although he may recover something. If authority is needed for that, it is to be found in *Gray* v. *Lord Ashburton.* (1) The result of our judgment is that the plaintiff will have to pay all the costs of this action: but if we had been obliged to uphold the judgment of the learned judge even to the limited extent of 40*l.*, I think the plaintiff should at any rate have been ordered to pay the major part of the costs of the action; for a more unreasonable action than his, I have seldom heard of. I agree that this appeal should be allowed.

SLESSER L.J. The appeal will be allowed. There will be judgment for the defendants on the claim with costs in this Court and in the Court below, and the sum of 75*l.* which was paid into Court by the defendants will be paid back to them. The judgment given by the learned judge in the Court below for the defendants on their counterclaim not having been appealed against by the plaintiff will accordingly stand.

Appeal allowed.

Solicitors for appellants: *Charles Greenwood & Co., Peterborough.*

Solicitors for respondent: *Gibson & Weldon, for Andrews, Stanton & Ringrose, Bourne.*

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(1) [1917] A. C. 26.

J. R.

ALDHAM *v.* UNITED DAIRIES (LONDON), LIMITED.

C. A.

1939

Nov. 25;

Dec. 11.

[1938. A. 2653.]

Negligence—Pony attached to milk-cart—Left unattended for half an hour—Injured pedestrian on pavement—Evidence of restiveness—Habit of putting its forefeet on pavement—Findings of jury—Liability of owners.

A pedestrian was walking on a pavement and as she passed a pony attached to a milk-cart, the pony, according to her account, "jabbed out" at her, bit her face, caught her by the coat and dragged her down, and then "pawed her with its feet." She brought an action against the owners of the pony, in which she claimed damages for personal injuries. The action was tried before Humphreys J. and a common jury.

The evidence showed that the pony was left unattended for half an hour while the roundsman delivered milk at a block of flats; that it had a habit, which was admitted by the defendants' servants, of putting its forefeet on the pavement. There was also evidence that when left unattended it became restive, and behaved in a way which, to some persons at least, was alarming.

By their answers to the first two questions the jury accepted the plaintiff's account of the occurrence. In answer to the question, had the defendants any knowledge of any propensity on the part of the horse to attack human beings? they said "no." In answer to the question whether the defendants were, in the circumstances of the case, negligent in leaving the horse unattended? they answered "yes," as they, the defendants knew that it had a habit of straying on to the pavement. They awarded the plaintiff 300*l.* damages. Humphreys J., after hearing argument, directed that judgment should be entered for the defendants. The plaintiff appealed:—

Held (reversing the decision of Humphreys J.), that to leave a horse and cart upon a highway in circumstances in which the driver knew, or, as a reasonable man, ought to have known, that the horse was likely to injure a member of the public, was unquestionably negligence, and that in this case the damage was due to such negligence. This the jury must be taken in effect to have found, the particular circumstances being the restiveness of the pony and its known habit of standing with its forefeet on the pavement when left unattended.

APPEAL from Humphreys J.

This was a case in which the appellant (the plaintiff) claimed damages for personal injuries from the respondents (the defendants). A pony belonging to the respondents and attached to a milk-cart was left unattended for half an hour

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while one of the respondents' roundsmen delivered milk at a block of flats. It had its forefeet on the pavement. The appellant stated that as she walked past the pony, it "jabbed "out" at her, bit her face, caught her by the coat and dragged her down, and then "pawed her with its feet." The pony's habit of putting its feet on the pavement was known to, and admitted by the respondents' servants, but they gave it a good character for docility. On the other hand there was evidence that when left unattended it became restive, put its forefeet on the pavement, and behaved in a way which, to some persons at least, was alarming. The action was tried before Humphreys J. and a common jury. By their answers to the first two questions the jury accepted the plaintiff's account of the occurrence. In answer to the question, had the defendants any knowledge of any propensity on the part of the horse to attack human beings? they said "No." Then they were asked whether the defendants were, in the circumstances of the case, negligent in leaving the horse unattended? They answered "Yes," knowing that the horse had a habit of straying on to the pavement, and they awarded the plaintiff damages of 300*l*. Humphreys J., after hearing the argument, directed that judgment should be entered for the defendants.

The plaintiff appealed. The appeal was heard on November 25, 1939.

W. Dudley Collard (*Robert Fortune* with him) for the appellant. If it was negligence to leave the pony unattended for such a length of time then the respondents are responsible for anything that happened. *Rose* v. *George Henry Collier, Ld.* (1) In *Bradley* v. *Wallaces, Ld.* (2) no amount of attendance could have prevented the assault by the horse. In *Cox* v. *Burbidge* (3) there was no evidence to show negligence by the defendant, while here there is direct evidence that the pony became restive when left unattended, and it was therefore negligence on the part of the respondents' roundsman to leave it unattended.

(1) [1929] W. N. 19.
(2) [1913] 3 K. B. 629.
(3) (1863) 13 C. B. (N. S.) 430.

Cyril Salmon for the respondents. There was no evidence here to show that the pony was restless or irritable, except that it had its forefeet on the pavement, and that proves nothing. It might equally have bitten the appellant if she had been in the roadway. The respondents do not owe the public a duty to prevent a horse biting. Even if there was negligence, there was no evidence to show that the accident was the result of the negligence. The pony did something quite unexpected of it, and the damage was, therefore, too remote to entitle the appellant to recover damages: see Romer L.J. in *Deen* v. *Davies*. (1) The appellant must show that the accident was the natural result of the negligence: *Fardon* v. *Harcourt-Rivington*. (2) This case is really on all fours with *Cox* v. *Burbidge*. (3)

[DU PARCQ L.J. The question of damage by animals is dealt with in Salmond on Torts, 9th ed., p. 566.]

It is not in the nature of a domestic animal to bite, and the owner of a horse is entitled to assume that it does not bite, unless he is fixed with knowledge that it does.

It was not reasonable for the jury, in the circumstances of this case, to find that the roundsman acted in a negligent manner.

Cur. adv. vult.

1939. Dec. 11. SIR WILFRID GREENE M.R. I have read the judgment prepared by du Parcq L.J. I am in entire agreement with it, but I think it desirable to express in my own language certain conclusions to which I have come.

To leave a horse and cart unattended on a highway is not without more an act of negligence. On the other hand, to leave a horse and cart upon a highway in circumstances in which the driver either knows, or as a reasonable man ought to know, that the horse is likely to injure a member of the public, is unquestionably negligence. This the jury must be taken in effect to have found in the present case, the particular circumstance being the restiveness of the pony. The jury must, I think, have meant that in view of the known habit of the pony, the driver ought to have known that it became restive; and a driver who knowingly leaves a restive pony unattended is justly held guilty of negligence.

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(1) [1935] 2 K.B. 282, 297.

(2) (1932) 146 L. T. 391.

(3) 13 C. B. (N. S.) 430.

Upon the question of remoteness of damage, the answer upon the facts of this case, appears to me to be free from doubt. If the act of negligence consists in leaving unattended on the highway a pony known to become restive, the owner is liable for all damage attributable to its restiveness, whether such damage is due to a casual mischievous or malevolent movement on the part of the pony. If, on the other hand, the movement is one which is not connected with the restiveness at all, the damage cannot be said to be caused by the negligence. In the present case I think that the jury's findings necessarily imply that in their opinion the damage was caused by the act of negligence which I have described and I agree that there was ample evidence to support such a conclusion.

Cox v. *Burbidge* (1) was a very different case. There the negligence alleged consisted merely in allowing the horse to escape. The only fact relied upon to establish this alleged negligence was the presence of the horse on the highway and as this was equally consistent with due care on the part of the defendant, the action failed. Erle C.J. said further that even if the negligence alleged were to be taken as established, the damage could not be referred to the act of negligence. Now it is important to observe that the negligence alleged was not the act of allowing a horse to escape in such circumstances that a reasonable man ought to have anticipated that it would cause injury to a person on the highway; it was the act of allowing it to escape simpliciter. Accordingly, the action of the horse in kicking the child fell to be considered not in connection with the existence of negligence at all (for the probability of its kicking was not a relevant consideration in regard to the negligence alleged) but in connection with the question of remoteness of damage. If the case had been one where the negligence alleged had consisted in (*a*) leaving a horse and cart unattended on the highway—an act not per se negligent—(*b*) in such circumstances that a reasonable person ought to have foreseen that it might kick a passer-by, the act of kicking would have been the direct consequence of the negligence. As it was, the act of kicking was not due to the alleged negligence although that negligence (on the assumption that it existed) gave the horse the opportunity of kicking—an altogether different thing.

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(1) 13 C. B. (N. S.) 430.

In dealing with questions relating to animals it must be borne in mind that an animal is capable of spontaneous action. If a man negligently relaxes his hold on an inanimate object he is liable for the damage which it causes, since that damage is the consequence of the act of negligence. But if a man negligently relaxes his hold on an animal it does not necessarily follow that he is liable for the damage caused by the animal in its state of freedom, for that damage may be due to a spontaneous act of the animal for which the want of care gives the opportunity, but of which it is not the cause. Thus, if a man leading a spirited horse in a country lane negligently allows it to escape from his control and it breaks into a gallop and knocks a person down as it rounds the next corner, the damage may truly be said to be caused by the negligence; for it is natural for such a horse to gallop away and a free galloping horse is likely to knock a person down in such circumstances. The damage in such a case is not too remote. If, on the other hand, the horse, having no known vicious propensities, celebrates its freedom by biting a passer-by, the position is quite different. It is true that if he had not been allowed to go free he would never have bitten the passer-by; but as there is no probability that such a horse will bite a passer-by merely because it is set free, the damage is attributable, not to the act of negligence in allowing the horse to go free, but to a spontaneous act of his own for which the act of negligence merely gave the opportunity. *Cox* v. *Burbidge* (1), on the assumption that the defendant there was negligent in allowing the horse to escape was a case of this class.

The appeal is allowed.

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(1) 13 C. B. (N. S.) 430.

MacKinnon L.J. I have had the advantage of reading the judgment that has just been read by the Master of the Rolls and the judgment of du Parcq L.J., which I am about to read, and I do not think I can usefully add anything to what they have said.

This is the judgment of du Parcq L.J. In this case the plaintiff, Miss Aldham, claimed damages for negligence against the defendants, who were the owners of a pony which, while unattended on the highway, had so behaved as to cause her injury. She said that as she walked past it on the pavement, it "jabbed out" at her, bit her face, caught her by the coat and dragged her down, and then "pawed her with its feet." The action was tried by Humphreys J. and a common jury. The learned judge left specific questions to the jury. By their answers to the first two questions the jury accepted the plaintiff's account of the occurrence. The remaining questions and answers were as follows: "Had the defendants any "knowledge of any propensity on the part of the horse to "attack human beings? (A.) No. —— In the circumstances "of the case were the defendants negligent in leaving the "horse unattended? (A.) Yes, knowing that the horse had "a habit of straying on to the foot pavement. —— Damages, "300*l.*"

The learned judge, after hearing argument, directed that judgment should be entered for the defendants, and against this decision the plaintiff appeals.

Evidence, which the jury must be taken to have believed, showed that the pony which injured the plaintiff had been left in the roadway, attached to a milk-cart and unattended, for about half an hour, while the defendants' roundsman was delivering milk. It was the usual practice of the defendants' servants so to leave it, and there was evidence that it was the pony's habit to become restive, to put its forefeet on the pavement and to behave in a way which, to some persons at least, was alarming. One witness, a governess, said that she had "many times" noticed that the pony was "restive and "difficult," and had seen him "get his two paws across the "path, which made it tiresome to get by, and, in fact, fearful."

"He has," she said, "a way of scraping the pavement or the "ground with one foot and moving his jaw about." The plaintiff herself had noticed the pony on previous occasions, and said: "If it is restless it just jabs out. It gets tired of "waiting." The pony's habit of putting its forefeet on the pavement was known to, and admitted by, the defendants' servants, but they gave the pony a good character and attributed to it a docility amounting to stolidity.

It may now be regarded as elementary law that in an action for negligence the plaintiff must prove, first, that the defendant as a reasonable man ought to have foreseen that the act or omission complained of might cause damage, and secondly, that the negligent act or omission directly caused the damage suffered by the plaintiff. If negligence is proved, the defendant is liable for damage caused by his negligence, even though he could not have been expected to foresee the exact kind or the "type" of damage which was caused in fact: *In re Polemis and Furness Withy & Co.* (1); see especially the judgments of Bankes L.J. (2) and Scrutton L.J. (3)

These general principles are no less applicable to a case in which the negligence alleged is failure to control a horse than to one in which the negligence is in the management of a motor-car or of any inanimate object. They must, however, be applied with proper regard to the limitations which the common law has placed on the liability of the owner of an animal mansuetae naturae, such as a horse. Where it is sought to impute liability to a defendant for the conduct of a living creature, capable of spontaneous action, it has been found necessary to lay down rules which prevent a jury from attributing to the reasonable man a degree of foresight which would anticipate every mischievous act of which an animal, hitherto docile, might conceivably be guilty, or from regarding the release of such an animal from custody or control, without more, as the direct cause of any violent departure from its accustomed docility which may ensue. Everyone knows that even a well-behaved animal may conceivably be guilty of such a sudden lapse, but if everyone was obliged to be constantly vigilant through his fear of such a misfortune, which the experience of mankind shows to be most improbable, it would hardly be safe ever to let a horse out of its stable.

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(1) [1921] 3 K. B. 560.

(2) Ibid. 571–2.

(3) Ibid. 576–7.

For the purpose of this case the established rules may be stated as follows: (1.) Negligence cannot be established merely by proof that a defendant has failed to provide against the possibility that a tame animal of mild disposition will do something contrary to its ordinary nature. (2.) Even if a defendant's omission to control or secure his horse is negligent, an act on the part of the horse which is contrary to its ordinary nature cannot be regarded, in the absence of special circumstances, as being directly caused by such negligence.

Authority for these propositions is to be found in the judgments of the Court of Common Pleas in *Cox* v. *Burbidge.* (1) It was argued on behalf of the respondents that the decision in *Cox* v. *Burbidge* (1) went further, and that whatever negligence there might be in leaving a horse unattended in the circumstances of a particular case, the fact that it had hitherto been well-behaved would always make it impossible to hold that its owner was responsible for damage due to such mischievous acts as biting or kicking. This contention appears to me to give no weight to the last two words of a sentence in the judgment of Erle C.J. which was much relied on: "It reduces itself to the question whether "the owner of a horse is liable for a sudden act of a fierce and "violent nature which is altogether contrary to the normal "habits of the horse, without more." It is also to be observed that in *Cox* v. *Burbidge* (2) the horse had kicked the plaintiff, in the words of Erle C.J., "without anything to account "for it."

In such cases as this it is always necessary to remember, in the words of Lord Atkin in *Fardon* v. *Harcourt-Rivington* (3) that " quite apart from the liability imposed upon the owner "of animals or the person having control of them by reason "of knowledge of their propensities, there is the ordinary duty

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(1) 13 C. B. (N. S.) 430.
(2) Ibid. 436.
(3) 146 L. T. 391, 392.

"of a person to take care either that his animal or his chattel "is not put to such a use as is likely to injure his neighbour." Compare the observations of Greer L.J. in *Sycamore* v. *Ley* (1) and of Slesser L.J. in *Deen* v. *Davies* (2), and the recent decision of this Court in *Rose* v. *George Henry Collier, Ld.* (3) The judgments in *Deen* v. *Davies* (2) all emphasize the importance of giving due weight to the precise circumstances of the particular case; see especially the judgment of Singleton J. (4)

In the case before us the learned judge was of opinion that there was evidence to support the jury's finding of negligence. The respondents' counsel contended that the judge's decision was wrong in this respect, but in my view it was clearly right. Speaking of the relevant answer of the jury, the judge said: "I think what the jury meant by that was that that was an "indication at least that the horse was getting tired, restive "and restless." This is, in my opinion, a fair view of the jury's meaning and on that view there was abundant evidence to support their finding. A horse's temper, however equable, may break down under a strain, and it may well be negligent to put an undue strain upon its patience.

The only question left is whether, in all the circumstances, the plaintiff's injuries can be said to have been directly caused by the defendants' negligence. It is true that no specific question was left to the jury as to this, but it is conceded (and no doubt rightly conceded) that the jury's verdict, with its award of damages, was intended to include a finding that the injuries were so caused. It was contended by counsel for the respondents that there was no evidence to support such a finding. In my view, and in this respect I am unable to agree with Humphreys J., there was ample evidence to support it. The facts here were very different from those in *Cox* v. *Burbidge*. (5) If a horse is not likely to bite or kick when it is at liberty in a field, it is impossible to say " without "more " that it will be likely to bite or kick if it strays from

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(1) (1932) 147 L. T. 342, 345.

(2) [1935] 2 K. B. 282, 288.

(3) [1939] W. N. 19.

(4) [1935] 2 K. B. 282, 297–9.

(5) 13 C. B. (N. S.) 430.

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the field on to a road. When a horse has been left unattended for so long that it has become restless and irritable, a jury may well think that an injury which it does to a foot passenger in its nervousness or annoyance is directly caused by the negligence of those who have failed to take proper care of it. The facts of the present case in my opinion fully justified the inference that the plaintiff's injuries were directly caused by the negligence of the defendants' servant in leaving an impatient horse unattended for too long a time.

It follows in my opinion that, on the jury's answers, the plaintiff was entitled to judgment and I think that her appeal should be allowed, that the judgment entered for the defendants should be set aside, and that judgment should be entered for the plaintiff for the sum of 300*l.* with costs. The plaintiff should also have the costs of this appeal.

Appeal allowed.

Solicitor for appellant: *W. T. Iggulden.*
Solicitors for respondents: *Blount, Petre & Co.*

P. J. B

WAY v. PENRIKYBER NAVIGATION COLLIERY COMPANY, LIMITED.

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Dec. 13.

Workmen's compensation—Accident arising out of and in course of employment—Evidence—Ostler employed in coal mine—Injury—Allegation that injury caused or aggravated by accident—Medical and other testimony—Notice of alleged accident—Payment of weekly sum by employer—Admission of accident.

A dependant of a deceased workman who had been employed in a coal mine made an application under the Workmen's Compensation Act, 1925, for compensation in respect of his death. An ambulance man employed in the mine stated that on August 22, 1938, he found the deceased suffering from a lump in the right groin and that he had to be helped out of the mine. A doctor who examined the deceased on that date noticed the swelling in his groin and said that a violent blow would have been necessary to produce that condition. A member of the deceased's household said that up to that date he had been a healthy man; that on that date he came home earlier than usual, being scarcely able to walk in, and having a lump in the groin; that after eleven weeks he went back to work; that then, the swelling being a sarcoma, he again fell ill, and eventually died. That witness further stated that notice of injury had been duly given to the employers, and that for the said eleven weeks they had paid the deceased a weekly sum equal to the full compensation to which he would have been entitled under the Act. These statements were not denied by the employers:—

Held, by the Court of Appeal (MacKinnon and Goddard L.JJ., Slesser L.J. dissenting), that the fact that the employers paid to the deceased for eleven weeks the amount of the compensation which would have been recoverable under the Act was some evidence of an admission by them that he had met with an accident arising out of and in the course of his employment, that that admission, taken along with the other facts deposed to, was sufficient evidence that he had met with such an accident, and that the applicant was entitled to the compensation which she claimed.

Appeal from an award by Judge Clark Williams, Aberdare County Court, under the Workmen's Compensation Act, 1925.

Ellen Jane Way, hereinafter called the "applicant," made an application under the Act for compensation from the Penrikyber Navigation Colliery Company, Ld., hereinafter called the "employers," in respect of the death of her father, Frederick Way, a workman employed by the employers, whose dependant she was.

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The application stated, with regard to the nature of employment, date and place of accident, and nature of injury to the deceased man, that "The workman, Frederick "Way, was employed as an ostler at the respondents' "(employers') colliery at Penrikyber and met with an accident "arising out of and in the course of his employment therein "on August 22, 1938"; that as the result of the accident he died on January 23, 1939; and, with regard to the date of service of statutory notice of accident on respondent from whom compensation is claimed, and whether given before deceased voluntarily left the employment in which he was injured, that "Notice of injury was duly given."

In the answer of the employers it was said: That the said Frederick Way, deceased, did not sustain injuries of the nature and in manner alleged in the request for arbitration on August 22, 1938; that the death of the said Frederick Way was not the result of his alleged accident; and that the said Frederick Way died from natural causes. There was no denial of the applicant's statement that notice of injury had been duly given.

On October 26, 1939, the application was heard by the county court judge.

The following evidence was given: Mr. Williams, the ambulance man in the colliery, stated that on August 22, 1938, the deceased went down the pit at about 5.30, that at 6.30 he (deponent) was called by the master haulier and directed to see the deceased, that he found the deceased sitting on a bin in the stables where his work was, suffering from a lump in the groin which disabled him, that he had to be helped out, and that he tottered home. Selina Way, mother of the applicant, who had lived with the deceased for many years, stated that up to August 22, 1938, the deceased was a healthy man, that she did not recollect that he had had any serious illness, and that he was a regular workman. On that date he came home earlier than usual, his usual time of return being 10 A.M. He could hardly walk in, and when she was washing him she noticed a small lump in the right groin. After eleven weeks he went back to work and then fell ill again. Later on, being again incapacitated, he fell and broke his arm and was taken to hospital. Selina Way further stated in her evidence that during the period when the deceased was home for eleven weeks, between August 22 and the time when he went back to work, he received full compensation at 30s. a week. Dr. R. Thomas, who examined the deceased on the day on which he came home early, noticed that he had a large swelling in the right groin and that the skin in that area was discoloured and bruised, and he expressed the view that a violent blow would be necessary to produce that condition.

The learned county court judge in his signed judgment stated the conclusion at which he arrived in these terms: "In this case I found that the deceased workman on "August 22, 1938, suffered an injury in the region of the "right groin by accident arising out of and in the course "of his employment under the respondents and that this "injury aggravated and accelerated, if it did not cause, the "growth and spread of the sarcoma which caused the death "of the workman, and that the injury accelerated the death." And the learned judge awarded compensation to the applicant.

The employers appealed. The appeal was heard on December 13, 1939.

F. W. Beney for the employers, appellants.

The county court judge was wrong in awarding compensation to the applicant. The applicant, as a dependant of the deceased workman, is not entitled to compensation from the employers unless the death of the deceased was caused by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1925. There was no evidence that the deceased's death was so caused. The evidence, apart from that relating to the payment of money by the employers to the deceased, tends on the whole to show that the death of the deceased was due to natural causes rather than to an accident. If the evidence shows that the death of the deceased was caused by an accident, it entirely fails to prove that the accident arose out of and

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in the course of the deceased's employment. No witness has stated and the judge has not found when, where or how the supposed accident happened or what its nature was. The fact that the employers, on receiving notice of the alleged accident, paid to the deceased a weekly sum during the period of eleven weeks from the date when his illness began does not prevent them from saying that there has been no accident. The making of such a payment does not estop an employer from denying that there has been an accident: *Manton* v. *Cantwell* (1); *Dutton* v. *Sneyd Bycars Co.* (2); *Ley* v. *Old Lodge Tinplate Co.* (3); Willis's Workmen's Compensation, 32nd ed., 652.

[SLESSER L.J. referred to *Harrison* v. *Featherstone.* (4)]

A payment made by an employer to a workman who has suffered an injury is not an admission of an accident in respect of which compensation is payable, unless it is made under an award or under a recorded agreement. If made otherwise it may have been made in charity or to prevent more costly proceedings under the Act, and in these cases the employer would not be liable to make them. [*Tucker* v. *Oldbury Urban Council* (5) was referred to.]

Maxwell Fyfe K.C. and *Griffith Williams* for the applicant, respondent.

The county court judge rightly awarded compensation to the applicant. The death of the deceased workman, on whom the applicant was a dependant, was caused by an accident arising out of and in the course of his employment. The evidence of Dr. Thomas goes to show that the deceased met with an accident, and in the absence of any statutory prohibition that evidence is admissible. The evidence of Mr. Williams, the ambulance man at the colliery, and of Selina Way, makes it reasonably clear that the accident occurred on August 22, 1938, and arose out of and in the course of the deceased's employment. The facts that notice of the deceased's injury was duly given to the employers and that they made him payments equal in amount to full compensation, are evidence of an agreement between the deceased and his employers for payment of compensation. That agreement constitutes an estoppel preventing the employers from denying that the deceased met with an accident arising out of and in the course of his employment, or at all events it amounts to an admission by them that he met with such an accident: see *Manton* v. *Cantwell.* (1)

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(1) [1920] A. C. 781.

(2) [1920] 1 K. B. 414; 12 B. W. C. C. 345.

(3) (1939) 32 B. W. C. C. 58.

(4) (1916) 10 B. W. C. C. 54.

(5) [1912] 2 K. B. 317.

F. W. Beney, in reply.

The county court judge has not found that there was any agreement between the employers and the deceased for payment of compensation. The circumstances of the present case do not amount to evidence of an accident arising out of and in the course of the employment: *Pitt* v. *Stretford and District Gas Board.* (2)

SLESSER L.J. In this case I regret to say that the Court is divided. In my opinion this appeal should succeed. I do not think that there was any evidence on which the learned judge could find in favour of the applicant that the deceased workman had met with an accident which arose out of and in the course of his employment. [His Lordship read the application, the answer, the evidence relating to the injury, and the judgment, so far as above set out, and continued:] The view expressed by Dr. Thomas, which we may assume the learned judge accepted, that a violent blow would be necessary to produce the swelling in the man's groin, was disputed by other doctors, but the learned judge was fully entitled to accept the evidence of Dr. Thomas to that effect. The learned judge, therefore, was entitled, if he accepted that evidence, to hold that the swelling of the right groin, and, I suppose, the many other incidences of sarcoma which broke out in different parts of the man's body, were either caused or accelerated by a blow which he had received on August 22, because Selina Way said that before that time he had had no serious illness and was a healthy man, a regular workman, and did not speak of any blow before then.

(1) [1920] A. C. 781.

(2) (1936) 29 B. W. C. C. 43.

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If there be any evidence on which the learned judge could have found as a fact that this man had suffered an accident on August 22 which ultimately caused his death, this Court could not disturb that finding, but it is said by Mr. Beney on behalf of the employers, that there was no such evidence, and that the learned judge, in coming to the conclusion to which he did, could only have arrived at it by a mere conjecture or guess and not by the process of logical inference. I do not think Mr. Beney disputes (if he does, I do not agree with him) that there was evidence that a violent blow caused the condition of this man, but that still leaves open the question how he did get this violent blow. As to that there is no evidence whatever. It may have been that he was alone at the time and that no one could speak to that matter. However that may be, there is a complete absence of evidence from any of his mates working with him of any accident at all. Mr. Beney says that the view that the blow arose out of and in the course of his employment is an entire assumption, and merely to state that the blow caused the ultimate death of the workman is no ground for saying that the death was caused by an accident arising out of and in the course of his employment, because there is no evidence how, when, or where the blow was received. I have not repeated the rest of the evidence because it is entirely negative in character and throws no light on the cause of the accident. If the matter had stayed there I should have entertained no doubt at all but that there was no evidence on which the learned judge could have come to the conclusion that the blow was caused by something which happened at the man's work.

But another question was raised which caused a good deal of discussion and the citation of authority, with which I must deal. Counsel for the applicant contended that there was other evidence which the learned judge could follow in coming to his conclusion than the evidence that the blow caused the man's death. This evidence, which appears to have been one of the elements present to the learned judge's mind, though not mentioned in his written judgment,

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is as follows: Selina Way stated in her evidence that during the period when the deceased was home for eleven weeks, between August 22 and the time when he went back to work, he received full compensation at 30*s.* a week. It is contended that that statement, coupled with the fact that it is conceded by the appellants that a notice of injury by accident was duly given, amounts to evidence that the man was being paid compensation in respect of an accident which happened on August 22, and, as I understand the argument, it is said that the accident can only be related to the blow which caused the little lump on the right groin which kept him at home.

This argument deserves very careful consideration. In my view, what is admitted here, on the evidence, and what is to be derived from the evidence, does not amount, on this head, to anything from which the learned judge was entitled to draw the inference that the dependant's claim should succeed. Compensation under the Workmen's Compensation Act may be paid for at least four different considerations. First, it may be paid as the result of an award, secondly, as the result of a recorded agreement, neither of which is this case. Thirdly, it may be paid as the result of an agreement not recorded, and, fourthly, it may be a mere voluntary payment not made under any agreement at all. This payment may or may not have been made under an agreement. It is sufficient for my purpose to say that I can find no evidence that it was made under an agreement, and it may well have been made as a mere voluntary payment. I do not think that it would be right to draw the conclusion that because an employer has received notice of an accident, and a payment of money has been made which somebody else, in this case Selina Way, describes as compensation, that that constitutes by itself any evidence of an agreement between the employer and the workman that in respect of the accident he shall receive the payment. It seems to me quite as likely that on this man giving notice of the accident this money was paid without prejudice to any rights which the employers might or might not have had at any future time to terminate that payment, subject, of course, to the operation of s. 12 of the Workmen's Compensation Act, 1925, which limits the right to stop compensation once it has been paid. That does not apply in this case because the workman in fact returned to work.

I find myself unable to draw any conclusion that that was any admission on behalf of the employers that they paid compensation in relation to an accident—that is to say an admission that in this case the accident happened on August 22 which resulted in the workman's death. For aught I know it may be that compensation was paid in relation to some disability on August 22 which was not the result of the blow at all but arose from some other cause. I do not think that it is right to speculate on these matters, and Mr. Beney put a very pertinent question to the Court when he asked rhetorically: "If this be an admission, of what is it an "admission?" I think it can on any view only amount to an admission that on that date having received a notice of an accident, the employers paid to the workman a certain sum of money, possibly equivalent to the sum which he would have been entitled to receive if he had a right to compensation.

I do not think myself that the authorities carry the matter any further. It is admitted that no question of estoppel arises. There is nothing to preclude the employers, as a matter of evidence, from raising any point which they desire to raise, and the only question is whether they have made an admission sufficient to afford some evidence, if evidence otherwise be lacking, that the workman received this blow while working in the course of his employment, and through it met his death.

For myself, I can find nothing to support that view. In *Pitt* v. *Stretford and District Gas Board* (1), cited by Mr. Beney in reply, it appears that a workman had made to a foreman a statement of an accident, which was duly entered in the book kept as a register of accidents under s. 15 of the Workmen's Compensation Act. That book was for the purpose

(1) 29 B. W. C. C. 43.

of satisfying the conditions of compensation as to notice, and it was there argued by Mr. Martin O'Connor that the entry in it was evidence of the fact that the man had met with an accident, the question otherwise being whether it was any evidence of an accident arising out of and in the course of his employment. This Court came to the conclusion that the mere entry in the book of the accident could not be used as evidence of the occurrence of the accident. In giving judgment I said: "It is evidence for that purpose"—that is that he had given notice—"and, in my opinion, for no "other purpose. It is evidence that the man did make a "statement to the foreman on July 27 that he had met with "an accident."

In the present case, the workman having given notice of the accident, the employer paid compensation which, as I say, may have been paid voluntarily or not; but, however it was paid, the payment seems a very long way from constituting any admission that the man met with this specific accident on that date. It is not conclusive but it is at least to be noted that not only in the application for arbitration but in the judgment itself no accident is defined as to place, time, or condition, and on reading the learned judge's judgment we are left completely in the dark what was the blow which alone could be said to be the effective cause of the accident. The learned judge abstained from finding that this man ever did suffer any blow and, apparently, as pleaded, it was no part of the applicant's case; at any rate, the applicant was unable, in making a claim, to define how, when or where this accident occurred. It would be wrong in my view, from the mere fact that the employers did pay compensation on August 22, which may have been done ex gratia, to draw the conclusion that that was an admission that the man had suffered a blow while at work. The authorities, although I abstain from citing them, satisfy me that there is no ground on which such an inference can properly be drawn.

Therefore, so far as I am concerned, the appeal would succeed, but, as the majority of the Court are of a different opinion, it fails, and must be dismissed.

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MACKINNON L.J. This is an appeal from an arbitration in which it was alleged that the applicant's father died as the result of an accident on August 22, 1938. It was asserted by the applicant that the death was caused or accelerated by the alleged accident, and the learned county court judge held that that assertion had been established and awarded her compensation. The only question argued, and the only question before us, is whether there was any evidence on which the learned county court judge could, as he did, come to the conclusion that the workman met with an accident on August 22.

The evidence with regard to that was that of three persons—Mr. Williams, the ambulance man in the colliery; Selina Way, the mother of the applicant; and Dr. R. Thomas. Selina Way, who lived with the deceased, gave evidence that up to August 22, 1938, presumably when she saw him depart for his work, he was a healthy man and a regular workman. It appears from the evidence of the ambulance man that the deceased went down the pit at about 5.30. At 6.30 the ambulance man was called by the master haulier and directed to see the deceased. He found the deceased sitting on a bin in the stables, where his work was, suffering from a lump in the groin which disabled him. He had to be helped out, and he tottered home. Then, to resume the evidence of Selina Way, he came home at about 10 o'clock, which was earlier than usual, and could hardly walk. Selina Way also saw the lump in his groin. The doctor said that he saw him on that morning, that he found a large swelling in the right groin, and that a violent blow would be necessary to produce that condition. The further facts proved were that the man gave notice of the accident of August 22. That is alleged in the pleading of the applicant and is not denied in the defence. She further proved that he stayed at home for eleven weeks and received from the employers full compensation at 30*s*. a week under the Workmen's Compensation Act. Those were the facts proved.

The question is a very subtle and difficult one, and my opinion has fluctuated during the course of the argument. It is whether, on proof of those facts, if not displaced or disputed by evidence on the part of the appellants, there is evidence on which the county court judge could come to the conclusion that there was an accident. I think that there is some evidence on which he could come to that conclusion, the main point being, in addition to the other facts which I have stated, that the deceased made his claim for compensation and that the appellants paid him compensation for eleven weeks. Prima facie, at any rate, it was paid on the basis that he had met with an accident, and the giving of compensation under that head is, I think, some evidence of it.

The appellants could have given evidence, had they been able to or desired to, that, though 30*s.* a week was paid to him, it was not paid in recognition or admission that he had met with an accident, but was paid without any investigation into the facts, or without prejudice, or merely out of charity, or in some other way. But in the absence of any evidence from them I think the fact of their paying the amount of the compensation which would be recoverable under the Act, for eleven weeks, left unexplained, is some evidence that they admitted that there was an accident, and that admission, taken with the other facts which I have indicated, is evidence on which the county court judge could come to the conclusion to which he came.

It occurs to me that one may test it in this way. Supposing counsel, before this case came into Court, had been asked to advise on evidence, and was given a statement that the various facts which I have indicated could be proved. I think that he would be right in saying: "If you can prove those "facts, that will be a prima facie case, but I must warn you "that we cannot foresee what evidence the employers may "call. If the employers call evidence to rebut any of those "facts, and, in particular, if they call evidence to explain "away the prima facie inference to be drawn from their "payment of compensation of 30*s.* a week, we may be in "difficulties." As no evidence was called by the employers, I think, on the facts which I have stated, that there was some evidence on which the learned county court judge could come to the conclusion to which he came.

In the result I think that the appeal fails and should be dismissed.

Goddard L.J. I agree with MacKinnon L.J. The outstanding feature of the case, to my mind, is this. Notice stating that an accident had happened on August 22, 1938, which is the date on which the applicant alleges that the accident happened, was given by the deceased man to his employers. Thereupon, for eleven weeks, that is to say until he returned to work, full compensation was paid by the employers to the workman. By "full compensation" I understand is meant the full amount which he was entitled to receive under the Act and, so far as the evidence goes, it was paid to him without any qualification of any sort whatever. I find it very difficult to see how it can be said that that is not some evidence on which the judge could find that the employers admitted that an accident had taken place.

The cases to which we have been referred were all cases in which it was sought to say that payment of compensation amounted to an estoppel. It does not amount to an estoppel and it could not properly be suggested that it does. But it may very well amount to prima facie evidence of an admission which can be rebutted if the employers choose to give evidence to rebut it.

Of the cases cited the one which, I think, brings out the distinction most clearly is *Harrison* v. *Featherstone*. (1) In that case an employer had paid to a lad compensation for an accident which the employer believed had taken place. When he ceased to pay compensation and the case came before the county court judge the whole facts were gone into, and, on the evidence, the county court judge was satisfied that there had never been an accident to the boy at all arising out of and in the course of his employment. He had met with the accident through larking. The county court judge said that the respondent, having paid compensation, was estopped from denying that an accident had taken place. This Court said that that was wrong and that there was no

(1) 10 B. W. C. C. 54.

estoppel, but the Court did not, in that case, have to consider the question whether the payment of compensation amounted to an admission, because the whole facts were gone into, the circumstances in which the payment was made were explained, and the county court judge found as a fact that the accident did not happen in the way alleged by the boy; so there being no estoppel, the boy was not entitled to any compensation.

In *Manton* v. *Cantwell* (1), a case which came from Ireland, the county court judge had held that the respondent was not estopped by an agreement from denying liability, but he found that the appellant was employed for the purpose of his employer's trade or business. The question was whether the employment was for the purpose of the employer's trade or business. The Court of Appeal in Ireland reversed the county court judge on that fact and held that the workman was not employed for the purpose of the employer's trade or business. The House of Lords decided that the county court judge's decision must stand because it was a question of fact, and he had evidence before him on which he could find, as he did, that the man was employed for the purpose of the employer's trade or business. But as the county court judge had given a judgment on the ground of estoppel, Lord Birkenhead L.C. and Lord Finlay dealt with that point and said, as this Court had said in *Harrison* v. *Featherstone* (2) that there was no estoppel. Since they were restoring the judgment of the county court judge, Lord Birkenhead did not find it necessary to deal with the question of the admission, which had not been argued in the Court below. It was not necessary to go into it in the House of Lords because, quite apart from any question of admission, the county court judge found facts which entitled him to make the award which he did make. This point, therefore, so far as I know, has never yet come before the Court.

It seems to me that it is prima facie evidence that the employer has admitted that an accident for which he was liable to pay compensation arose, if he has paid the man full

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(1) [1920] A. C. 781.

(2) 10 B. W. C. C. 54.

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compensation without qualification for eleven weeks. I quite recognise that considerate employers from time to time have been known to pay compensation for accidents, although they may be under no legal liability to do so. Generally when that happens it is found that the money is stated to be paid without prejudice, or as an act of grace. But, after all, we are dealing here not with what I may call a private employer but with a colliery company. And, as everybody knows, in these matters of employer's liability under the Workmen's Compensation Act insurance companies are concerned; and, indeed, rights are given to the workmen, in certain circumstances, to enforce their claims against insurance companies. It is very unusual to find a workman receiving full compensation for eleven weeks without any qualification that it was paid without prejudice on the footing that it was a mere voluntary payment. If the payment had been made by mistake, or because the appellants believed that an accident had taken place when in fact it had not, or if it was the fact that they accepted the man's word and never took the trouble to inquire into the matter, they could have proved that. Once the applicant had proved that the deceased had met with an accident and had received the amount to which he was entitled by statute to be paid by the employers, it seems to me that there was evidence on which the county court judge could say so long as that was unexplained and uncontradicted: "I shall hold that that accident entitling the "man to compensation did take place on the day from which "you paid compensation, which was the day on which the "notice admittedly received by you stated that the accident "took place."

I think, too, that the case was strengthened by the evidence of Mr. Williams and the doctor. Mr. Williams was sent to the workman by the master haulier and he applied a bandage. Obviously, from the nature of the bandage and from what he saw Williams thought that an accident had taken place. The doctor stated that from what he saw on that day, from the nature of the swelling and so forth, he thought that an accident had taken place and that the workman had received a violent blow. So the man received compensation for eleven weeks. He then went back to work again and ultimately collapsed and died.

For these reasons I think that there was evidence on which the learned judge could come to the conclusion to which he came, and, as I agree with MacKinnon L.J., the appeal will be dismissed.

I may add one observation to my judgment. Mr. Maxwell Fyfe argued that the money was deemed to be paid under an agreement within s. 21 of the Act. I do not want it to be thought that I have overlooked that argument. I only say that, for myself, I prefer to rest my judgment on the ground which I have stated and to express no opinion as to that argument.

SLESSER L.J. The appeal will be dismissed.

Solicitor for appellant: *Arthur J. Prosser, Cardiff.*

Solicitors for respondents: *Morgan, Bruce & Nicholas, Pontypridd.*

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CHAPELTON *v.* BARRY URBAN DISTRICT COUNCIL.

Contract—Hire of deck chair—Notice containing no limitation of liability—Ticket—Condition on ticket purporting to limit liability of owners of chair—Hirer of chair ignorant of condition—Terms upon which chair hired—Defective chair—Liability of owners of chair for accident to hirer.

The plaintiff, who wished to hire a deck chair on a beach went to a pile of deck chairs belonging to the defendant council near to which was displayed a notice in the following terms: "Barry "Urban District Council. Cold Knap. Hire of chairs 2*d.* per "session of 3 hours." The notice went on to state that the public were requested to obtain tickets for their chairs from the chair attendants and that those tickets should be retained for inspection. There was nothing on the notice relieving the defendant council from liability for any accident or damage arising out of the hire of a chair. The plaintiff obtained two chairs from the attendant for which he paid 4*d.* and received two tickets therefor. The plaintiff glanced at the tickets and slipped them into his pocket and had no idea that they contained any conditions. On one side of the tickets were the words: "Barry "Urban District Council. Cold Knap. Chair Ticket 2*d.* Not "transferable," with half hours printed on the side of the tickets. On the other side of the tickets were the words: "Available for "three hours. Time expires where indicated by cut-off and "should be retained and shown on request. The council will "not be liable for any accident or damage arising from the hire "of the chair." The plaintiff put the chairs up in the ordinary way on a flat part of the beach, and then sat down on a chair which gave way, the canvas having come away from the top of the chair. In an action against the defendants the county court judge found that the accident was due to the negligence of the defendants, but that the defendants were exempted from liability as the plaintiff had sufficient notice of the special contract printed on the ticket. On appeal:—

Held, that the ticket was a mere voucher or receipt for the money paid for the hire of the chair, and that the conditions upon which the local authority offered to hire out the chairs were those contained in the notice put up near the pile of chairs, and that as that notice contained no limitation of liability for any accident or damage arising from the hire of the chairs, the local authority were liable to the plaintiff.

Appeal from a decision of the judge of the Cardiff and Barry County Court.

The facts are fully set out in the judgment of Slesser L.J. In an action by the plaintiff against the Barry Urban District

Council the county court judge found as a fact that the accident to the plaintiff was due to negligence on the part of the defendants, but he held, relying on *Thompson* v. *London, Midland and Scottish Ry. Co.* (1), that the defendants were exempted from liability by reason of the fact that the plaintiff had sufficient notice of the special contract printed on the ticket.

The plaintiff appealed.

Carey Evans for the appellant. The county court judge was wrong in holding that the plaintiff had sufficient notice of the conditions printed on the ticket and was therefore bound by the same. *Henderson* v. *Stevenson* (2) is directly in point in the present case.

The defendants in the county court relied upon the decision of the Court of Appeal in *Thompson* v. *London, Midland and Scottish Ry. Co.* (3), especially the judgment of Sankey L.J. In that case it was held, following *Watkins* v. *Rymill* (4), that the plaintiff was bound by the special contract made on the excursion ticket on the acceptance of that ticket. That case is distinguishable from the present case because here there was nothing on the face of the ticket to call attention to the fact that there were conditions printed on the back of the ticket. The remarks of Mellish L.J. in *Parker* v. *South Eastern Ry. Co.* (5) apply directly to the present case. The ticket in the present case was like a receipt for a toll paid at a toll gate. [*Nunan* v. *Southern Ry. Co.* (6) was also referred to.]

Ryder Richardson (for *Griffith Williams* on war service) for the respondents. It was a question of fact for the county court judge to say whether there was a written contract concluded between the parties, and whether it contained terms which were brought to the notice of the plaintiff, and he has held that the terms were brought to the notice of the plaintiff. That finding is binding on the plaintiff. A

(1) [1930] 1 K. B. 41.
(2) (1875) L. R. 2 H. L. (Sc.) 470.
(3) [1930] 1 K. B. 41, 54.
(4) (1883) 10 Q. B. D. 178.
(5) (1877) 2 C. P. D. 416, 422.
(6) [1923] 2 K. B. 703; [1924] 1 K. B. 223.

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person is not entitled to the use of a chair without first obtaining a chair ticket from the attendant. The notice that was exhibited was no more than an offer by the defendants to treat. The ticket that was issued to the plaintiff constituted a contract between the parties the terms of which were binding on the plaintiff; it was not merely a receipt for the 2*d.* paid for the hire of the chair. It was said by Stephen J. in *Watkins* v. *Rymill* (1) that the facts in *Henderson* v. *Stevenson* (2) were so peculiar that that case could hardly form a precedent for any other. This case falls within the observations of Sankey L.J. in *Thompson* v. *London, Midland and Scottish Ry. Co.* (3) The county court judge has held, and he was entitled so to hold, that the defendants had taken reasonable steps to bring the conditions on which the chair tickets were issued to the notice of the plaintiff who is accordingly bound by the same.

SLESSER L.J. This appeal arises out of an action brought by Mr. David Chapelton against the Barry Urban District Council, and it raises a question of some importance to the very large number of people who are in the habit of using deck chairs to sit by the seaside at holiday resorts.

On June 3, 1939, Mr. Chapelton went on to the beach at a place called Cold Knap, which is within the area of the Barry Urban District Council, and wished to sit down in a deck chair. On the beach, by the side of a café, was a pile of deck chairs belonging to the defendants, and by the side of the deck chairs there was a notice put up in these terms: "Barry Urban District Council. Cold Knap. Hire of chairs, "2d. per session of 3 hours." Then followed words which said that the public were respectfully requested to obtain tickets for their chairs from the chair attendants, and that those tickets must be retained for inspection.

Mr. Chapelton, having taken two chairs from the attendant, one for himself and one for a Miss Andrews, who was with him, received two tickets from the attendant, glanced at them, and slipped them into his pocket. He said in the court below that he had no idea that there were any conditions on those tickets and that he did not know anything about what was on the back of them. He took the chairs to the beach and put them up in the ordinary way, setting them up firmly on a flat part of the beach, but when he sat down he had the misfortune to go through the canvas, and, unfortunately, had a bad jar, the result of which was that he suffered injury and had to see a doctor, and in respect of that he brought his action.

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(1) 10 Q. B. D. 182.
(2) L. R. 2 H. L. (Sc.) 470.
(3) [1930] 1 K. B. 41, 56.

The learned county court judge has found that if he had been satisfied that the plaintiff had had a valid legal claim, he would have awarded him the sum of 50*l.* in addition to the special damages claimed.

The learned county court judge also found that the accident to the plaintiff was due to the negligence on the part of the defendants in providing a chair for him which was unfit for its use which gave way in the manner which I have stated. But he nevertheless found in favour of the defendants by reason of the fact that on the ticket which was handed to Mr. Chapelton when he took the chair appeared these words: "Available for 3 hours. Time expires where indicated by "cut-off and should be retained and shown on request. "The Council will not be liable for any accident or damage "arising from hire of chair."

As I read the learned county court judge's judgment (and we have had the advantage of a note taken by Mr. Carey Evans in addition to the summary reasons which the learned county court judge gives for his decision), he said that the plaintiff had sufficient notice of the special contract printed on the ticket and was, accordingly, bound thereby—that is to say, as I understand it, that the learned county court judge has treated this case as a case similar to the many cases which have been tried in reference to conditions printed on tickets, and more particularly, on railway tickets—and he came to the conclusion that the local authority made an offer to hire out this chair to Mr. Chapelton only on certain conditions, which appear on the ticket, namely, that they, the council, would not be responsible for any accident which arose from the use of the chair, and they say that Mr. Chapelton hired the chair on the basis that that was one of the terms of the contract between him and themselves, the local authority.

Questions of this sort are always questions of difficulty and are very often largely questions of fact. In the class of case where it is said that there is a term in the contract freeing railway companies, or other providers of facilities, from liabilities which they would otherwise incur at common law, it is a question as to how far that condition has been made a term of the contract and whether it has been sufficiently brought to the notice of the person entering into the contract with the railway company, or other body, and there is a large number of authorities on that point. In my view, however, the present case does not come within that category at all. I think that the contract here, as appears from a consideration of all the circumstances, was this: The local authority offered to hire chairs to persons to sit upon on the beach, and there was a pile of chairs there standing ready for use by any one who wished to use them, and the conditions on which they offered persons the use of those chairs were stated in the notice which was put up by the pile of chairs, namely, that the sum charged for the hire of a chair was 2*d*. per session of three hours. I think that was the whole of the offer which the local authority made in this case. They said, in effect: "We offer to provide you "with a chair, and if you accept that offer and sit in the "chair, you will have to pay for that privilege 2*d*. per session "of three hours."

I think that Mr. Chapelton, in common with other persons who used these chairs, when he took the chair from the pile (which happened to be handed to him by an attendant, but which, I suppose, he might have taken from the pile of chairs himself if the attendant had been going on his rounds collecting money, or was otherwise away) simply thought that he was liable to pay 2*d*. for the use of the chair. No suggestion of any restriction of the council's liability appeared in the notice which was near the pile of chairs. That, I think, is the proper view to take of the nature of the contract in this case. Then the notice contained these further words: "The public are respectfully requested to obtain "tickets properly issued from the automatic punch in "their presence from the Chair Attendants." The very language of that "respectful request" shows clearly, to my mind, that for the convenience of the local authority the public were asked to obtain from the chair attendants tickets, which were mere vouchers or receipts showing how long a person hiring a chair is entitled to use that chair. It is wrong, I think, to look at the circumstance that the plaintiff obtained his receipt at the same time as he took his chair as being in any way a modification of the contract which I have indicated. This was a general offer to the general public, and I think it is right to say that one must take into account here that there was no reason why anybody taking one of these chairs should necessarily obtain a receipt at the moment he took his chair—and, indeed, the notice is inconsistent with that, because it "respectfully requests" the public to obtain receipts for their money. It may be that somebody might sit in one of these chairs for one hour, or two hours, or, if the holiday resort was a very popular one, for a longer time, before the attendant came round for his money, or it may be that the attendant would not come to him at all for payment for the chair, in which case I take it there would be an obligation upon the person who used the chair to search out the attendant, like a debtor searching for his creditor, in order to pay him the sum of *2d.* for the use of the chair and to obtain a receipt for the *2d.* paid.

I think the learned county court judge has misunderstood the nature of this agreement. I do not think that the notice excluding liability was a term of the contract at all, and I find it unnecessary to refer to the different authorities which were cited to us, save that I would mention a passage in the judgment of Mellish L.J. in *Parker* v. *South Eastern Ry. Co.* (1), where he points out that it may be

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(1) 2 C. P. D. 416, 422.

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that a receipt or ticket may not contain terms of the contract at all, but may be a mere voucher, where he says: "For instance, "if a person driving through a turnpike-gate received a ticket "upon paying the toll, he might reasonably assume that the "object of the ticket was that by producing it he might be "free from paying toll at some other turnpike-gate, and might "put it in his pocket unread." I think the object of the giving and the taking of this ticket was that the person taking it might have evidence at hand by which he could show that the obligation he was under to pay *2d.* for the use of the chair for three hours had been duly discharged, and I think it is altogether inconsistent, in the absence of any qualification of liability in the notice put up near the pile of chairs, to attempt to read into it the qualification contended for. In my opinion, this ticket is no more than a receipt, and is quite different from a railway ticket which contains upon it the terms upon which a railway company agrees to carry the passenger. This, therefore, is not, I think, as Mr. Ryder Richardson has argued, a question of fact for the learned county court judge. I think the learned county court judge as a matter of law has misconstrued this contract, and looking at all the circumstances of the case, has assumed that this condition on the ticket, or the terms upon which the ticket was issued, has disentitled the plaintiff to recover. The class of case which Sankey L.J. dealt with in *Thompson* v. *London, Midland and Scottish Ry. Co.* (1), which seems to have influenced the learned county court judge in his decision, is entirely different from that which we have to consider in the present appeal.

This appeal should be allowed.

MACKINNON L.J. I agree that this appeal should be allowed. The learned county court judge decided this case relying upon a dictum of Sankey L.J. when he was speaking of a transaction which was totally different to this one. If a man does an act which constitutes the making of a contract, such as taking a railway ticket, or depositing his bag in a cloak-room, he will be

(1) [1930] 1 K. B. 41, 53.

bound by the terms of the document handed to him by the servant of the carriers or bailees; but if he merely pays money for something and receives a receipt for it, or does something which clearly only amounts to that, he cannot be deemed to have entered into a contract in the terms of the words that his creditor has chosen to print on the back of the receipt, unless, of course, the creditor has taken reasonable steps to bring the terms of the proposed contract to the mind of the man. In this case there was no evidence upon which the learned county court judge could find that the defendants had taken any steps to bring the terms of their proposed contract to the mind of the plaintiff. In those circumstances, I am satisfied that the defendants could not rely upon the words on the back of the ticket issued to the plaintiff, and, having admittedly been negligent in regard to the condition of the chair, they had no defence to the plaintiff's cause of action.

GODDARD L.J. I agree. In my view the cases which deal with railway tickets, cloak-room tickets, or documents issued by bailees when they take charge of goods, have no analogy to this case. In this case the appellant paid 2*d.* in order to have the right to sit on a chair on the beach, and he was asked to take a ticket in the form of a receipt for that purpose, and was given a document which shows nothing on the face of it, except that the man had the right to sit in the chair until 7.30 P.M. on the day when the accident occurred and the fact that the ticket was not transferable. I cannot imagine that anybody paying 2*d.* under those circumstances for the privilege of sitting in a chair on the beach would think for one moment that some conditions were being imposed upon him which would limit his ordinary rights, or that the document he received when paying his 2*d.* was a contractual document in any shape or form. I think the ticket he received was nothing but a receipt for his 2*d.*—a receipt which showed him how long he might use the chair. I think the learned judge below was wrong in thinking that the case of *Thompson* v. *London, Midland and Scottish Ry. Co.* (1), upon which he

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(1) [1930] 1 K. B. 41.

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seems to have relied, had any bearing on the present case. One must have regard to the facts of the case and the general circumstances of the case. In my opinion, *Thompson* v. *London, Midland and Scottish Ry. Co.* (1) has no bearing at all on this case.

I agree that there was no evidence upon which the learned judge below could find that the plaintiff was bound by *this* condition on the ticket, and, therefore, this appeal must succeed.

Appeal allowed.

Solicitors for appellant: *Kingsley Wood, Williams & Murphy, for Edward T. Davies & Son, Cardiff.*

Solicitors for respondents: *Wrentmore & Son, for Thomas John & Co., Cardiff.*

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(1) [1930] 1 K. B. 41.

R. F. S.

MIDDLESEX COUNTY COUNCIL *v.* ESSEX COUNTY COUNCIL.

1939
Dec. 19;

1940
Feb. 9.

Poor law—Settlement—Wife—Children—Husband living apart—Wife and children in receipt of relief—Poor Law Act, 1930 (20 *Geo.* 5, *c.* 17), *s.* 18, *proviso* (*b*).

In 1933 a husband deserted his wife and children and from 1934 he lived apart from them in the county of M. without personally receiving poor relief. In May, 1937, the wife and the children became chargeable to the county of E.:—

Held, that, in view of the terms of proviso (*b*) to s. 18 of the Poor Law Act, 1930, the relief given to the wife and the children must be considered, not as given to the husband, but as given to the wife in the same manner and subject to the same conditions as if she were a widow, with the result that nothing had happened to prevent the husband acquiring in the county of M. a settlement which, by s. 85, sub-ss. 1 and 2, of the Act, the wife and the children would take and follow, so that an order made in August, 1937, for the removal of the wife and the children from the county of E. to the county of M. was valid.

CASE stated under the Quarter Sessions Act, 1849, s. 2.

Elizabeth Day was the lawful wife of John Day, to whom she was married on August 22, 1918. Dorothy, Jessie and Raymond Day were all children of the marriage. None of the children at the material time had attained the age of sixteen, and none of them was blind, or deaf and dumb.

From the date of the marriage to June 27, 1922, the husband and the wife resided in the county of London without interruption and without receiving poor relief. From June 28, 1922, to about the month of April, 1933, the husband and the wife continued to reside in the county of London, but were from time to time in receipt of poor relief. About the month of April, 1933, the husband deserted the wife and the children, and thereafter lived apart from them. From about the month of April, 1933, to May 25, 1937, the wife resided in the county of London, and was continuously in receipt of poor relief for herself and for the children who all lived with her. On November 17, 1933, on complaint made by the wife, a maintenance order was made against

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MIDDLESEX C. C. v. ESSEX C. C.

the husband. On May 25, 1937, the wife and the children went to live in the county of Essex. On the following day they all became chargeable to the county of Essex, and remained so chargeable until August 5, 1937. From about the month of April, 1934, the husband resided at Kilburn and elsewhere, in the county of Middlesex, without interruption and without receiving poor relief, unless the relief given to the wife or to the children was to be considered as being given to him.

On August 5, 1937, two Justices of the Peace for the county of Essex ordered the wife and children to be removed to the county of Middlesex. On September 9, 1937, the appellants, Middlesex County Council, gave notice of appeal to Essex Quarter Sessions against the order. Later, by consent of the parties and by order of Asquith J., this case was stated for the opinion of the Court.

Cartwright Sharp K.C. and *Harold B. Williams* for Middlesex County Council. The order of the Essex justices was wrong since the last legal settlement of the wife and children was in the county of London. It is true that a married woman follows the settlement of her husband (Poor Law Act, 1930, s. 85, sub-s. 2), and that John Day had resided in the county of Middlesex for more than the three years necessary for him to acquire a settlement therein (s. 86, sub-s. 1). But the time during which a person is in receipt of poor relief must be excluded in the computation of time to establish his irremovability or settlement (s. 93, sub-s. 1 (*f*)), and all relief given to a wife and children is to be considered as given to the husband and father (s. 18). Therefore, John Day was notionally in receipt of poor relief during the whole time he resided in the county of Middlesex, with the result that he never acquired a settlement therein, and nothing has occurred to displace his settlement in the county of London.

R. M. Montgomery K.C. and *H. W. Wightwick* for Essex County Council. The order of the justices was right, for John Day's settlement is in Middlesex, the relief received by his wife not having prevented his acquiring that settlement. By s. 18, proviso (*b*), of the Poor Law Act, 1930, where the husband of a woman is living apart from her, all relief given to her or to her children is to be considered as given to her in the same manner and subject to the same conditions as if she were a widow. That is an exception from the general provision of the section that all relief given to a wife is to be considered as given to her husband, thus preventing him acquiring a settlement by residence during a time when his wife is in receipt of relief, although that exception is expressed to be without prejudice to the liability of the husband in respect of the relief. A married woman deserted by her husband is not in the same position under the Act as a married woman living with her husband. She can, for instance, acquire for herself a settlement by residence (s. 86, sub-s. 2).

Cartwright Sharp K.C. replied.

Cur. adv. vult.

1940. Feb. 9. The judgment of the Court (LORD HEWART C.J., CHARLES J. and HILBERY J.) was read by HILBERY J. who, after stating the facts, continued: It was expressly agreed between the parties that: (1.) After being deserted by the husband, the wife had not acquired for herself a settlement by residence. (2.) The wife takes and follows the settlement of the husband by virtue of the provisions of s. 85, sub-s. 2, of the Poor Law Act, 1930. (3.) The children take and follow the settlement of the husband (their father) by virtue of the provisions of s. 85, sub-s. 1, of the same Act.

Put shortly, the appellants' contentions were that the order of removal was bad because John Day, the husband, did not, up to July, 1937, reside for a period of three years at Kilburn and elsewhere in the county of Middlesex in such manner and in such circumstances as to be settled therein, because the relief given to his wife and children during that time must be considered as given to him; that the last legal settlement by residence of the husband was derived from a period of residence, until the year 1922, for three years and upwards at 14, Sidmouth Street, Holborn, and elsewhere in the county of London; and that the wife was a deserted woman and derived and retained such settlement by residence as her husband had by virtue of his residence as aforesaid in the county of London. The respondents contended that the husband's residence in the county of Middlesex for a period of three years commencing in or about April, 1934, was in each of those years such as would, in accordance with s. 93, sub-s. 1, of the Act, render him irremovable from the county of Middlesex; that by reason of proviso (*b*) to s. 18 of the Poor Law Act, 1930, the relief given to the wife and the children after the month of April, 1933, when the husband began to live apart from his wife and children, was not to be considered as relief given to the husband; and that the husband, by reason of his residence, acquired a settlement in the county of Middlesex and was last legally settled therein.

Sect. 18 is as follows: "All relief given to or on account "of a wife shall be considered as given to her husband, and "all relief given to or on account of any child under the age "of sixteen, not being blind or deaf and dumb, shall be con-"sidered as given to the father of the child, or to the husband "of the mother, or, if the mother of the child is unmarried "or a widow, to the mother of the child, as the case may be: "Provided that—(*a*) nothing in this section shall discharge "the father, grandfather, mother or grandmother of any child "from liability to relieve and maintain the child in pursuance "of the provisions of this Act; and (*b*) where the husband "of a woman is beyond the seas, or in legal custody, or in "confinement in a licensed house or asylum as a lunatic or "idiot, or is living apart from her, all relief given to her or to "her child shall, notwithstanding her coverture, be considered "as given to her in the same manner and subject to the same "conditions as if she were a widow, without prejudice, how-"ever, to the liability of her husband in respect of the "relief."

The question is, therefore, whether in the circumstances the husband is to be considered in law as the recipient of the relief given to his wife and children while living apart from him. If he is so considered, then he has not acquired a settlement in Middlesex, for during the whole of the time he has resided in Middlesex his wife has been in receipt of poor relief, and the order for the removal of his wife and children to Middlesex is bad and the appeal succeeds.

It will be noticed that s. 18 begins by providing that relief given to or on account of a wife shall be considered as given to her husband. Those words, one would suppose, are intended not merely to make the husband liable for the relief given to his wife, but to make him the recipient of the relief in the eyes of the law. In that case such disabilities as result from the receipt of relief will attach to him. They will attach to him not because he has actually received any relief himself, but as a consequence in law of relief being given in fact to his wife. Except for the proviso, his position would be the same though living apart from his wife. He would still be considered as the recipient of the relief given to his wife. By proviso (*b*) to this section, however, it is enacted that "where the husband of a woman . . . . is living apart from "her, all relief given to her or to her child shall, notwith-"standing her coverture, be considered as given to her in "the same manner and subject to the same conditions as if "she were a widow, without prejudice, however, to the "liability of her husband in respect of relief." The scheme of proviso (*b*) seems to be to draw a distinction between the person who is to be considered the recipient of the relief and the person who, notwithstanding that he is not the recipient in fact or law, is to be under a liability for it. The relief, the proviso says, is to be considered as given to the wife under the same conditions and exactly as if she were a widow —that is to say, as if her husband were dead, although, ex hypothesi, he is alive.

The proviso is thus creating an exception, where the wife is living apart from her husband, to the rule just expressed in the section that relief given to a wife shall be considered as given to her husband. But while thus providing that, in considering to whom the relief is to be considered in law as given, the husband is to be treated as dead, none the less, as the husband is not in fact dead, there is added to the proviso an express reservation of liability for the relief on the part of the husband. The very fact that this reservation of liability on his part is expressly added goes some way to show that without it the husband would have no such liability, and if without it he would have had no liability, then relief given to his wife living apart from him could not have been considered as given to him. Moreover, in the section itself it is provided that where the mother of a child is a widow the relief given her on account of the child shall be considered as given to the mother. That is to say, a widow whose child is relieved shall be considered the person to whom the relief is given. Where, then, the proviso says that relief given to a wife living apart from her husband is to be considered as given in the same manner and subject to the same conditions as if she were a widow, one would suppose it was intended to provide that in such circumstances she should be the person considered as the recipient of the relief and as the one to whom the relief was given, just as when she is in fact a widow she is to be considered the person to whom relief to or for her child is given.

We arrive, therefore, at the conclusion that the relief given to a wife whose husband is living apart from her must be considered by reason of proviso (*b*) to s. 18 as given to her and not as given to the husband. The husband, therefore, during his residence in Middlesex, has not, in law, been in receipt of relief. He has acquired a settlement in Middlesex and by virtue of s. 85, sub-ss. 1 and 2, the wife and children take and follow that settlement. The answer to the question asked is that the wife and children are last legally settled in Middlesex. The order for removal made on August 5, 1937, by the justices was therefore right.

Since by consent of the parties and by the order of this Court of February 2, 1939, this special case was stated and it was agreed between the parties that judgment in conformity with the decision of this Court and for such costs as this Court might adjudge might be entered at the quarter sessions, the judgment of this Court will be entered for the respondents and this appeal will be dismissed, with costs, and the respondents will enter judgment accordingly at the quarter sessions.

Appeal dismissed.

Solicitor for appellants: *C. W. Radcliffe.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for E. S. Holcroft, Chelmsford.*

G. F. L. B.

1940
Feb. 6.

MAUDE *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Income tax—Repayment—Banker and customer—Bank overdraft—Interest—Customer not resident in United Kingdom—Head office in London—Branch office in Guernsey—Interest "payable in United Kingdom"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 36, *sub-s.* 1.

The appellant, a British subject resident in Guernsey, had an account at the Guernsey branch of the N. P. Bank, the head office of which was in London. In 1937 the appellant had an overdraft on her account upon which she paid interest out of her taxed profits. The N. P. Bank was assessed to income tax in London on its profits, including profits from its branches. The appellant claimed repayment of tax on the amount of interest on the overdraft in virtue of the Income Tax Act, 1918, s. 36, sub-s. 1:—

Held, that, in the absence of agreement to the contrary, the interest might properly have been tendered at the head office of the bank in London; that it was, therefore, "interest payable "in the United Kingdom" within s. 36, sub-s. 1; and that, the appellant was entitled to the relief claimed.

CASE stated by Commissioners for Special Purposes under the Income Tax Act, 1918, s. 19, sub-s. 2.

The appellant, Mrs. Maude, was a British subject resident in Guernsey. In 1937 she had an account at the Guernsey branch of the National Provincial Bank, Ld., and in that year she paid interest amounting to 133*l.* 6*s.* to the Guernsey branch on an overdraft. The head office of the bank was in London, where the bank was assessed to tax on profits, including profits from its branches. The appellant's income was partly liable to United Kingdom income tax, and partly not so liable. The Commissioners were satisfied that the "liable" portion exceeded 133*l.* 6*s.* The appellant claimed relief under s. 36 of the Income Tax Act, 1918, for the year ending April 5, 1937, on 133*l.* 6*s.*, but this claim had been disallowed by the Commissioners. Prior to 1936 she had an account with the Exeter branch of the National Provincial Bank, but she then transferred her account to the Guernsey branch and in 1936 arranged with the manager of that branch for an overdraft. She executed a charge in the usual form in favour of the bank, and, while no specific terms were fixed as to payment of interest, interest on the overdraft was in fact paid by debiting her account therewith. After the transfer of her account to the Guernsey branch the whole of her income subject to United Kingdom tax was paid into her account with that branch.

The Special Commissioners held that the claim failed because the interest was not payable in the United Kingdom.

Raymond Needham K.C. and *Scrimgeour* for the appellant. First, this is interest paid by the appellant without deduction of tax, and the Income Tax Act, 1918, s. 36 (1), gives a right to claim repayment of tax, provided that the interest has been so paid out of income brought into charge to tax. "The "principle involved is that the interest paid is to be deemed "income not of the payer, but of the recipient, and hence, "if the payer has paid tax on it, he is entitled to repayment "from the revenue authorities, who otherwise would be "getting tax twice over for the same sum of interest from "payer and recipient, whereas the tax is only due once, and "is due from the recipient whose income it is deemed to be": Judgment of Lord Wright in *Fenton's Trustee* v. *Inland Revenue Commissioners.* (2) Passages in the judgment of Greene L.J. in that case (3) are to the same effect. The object of the Legislature was to avoid double taxation, and in the case of yearly interest the payer was entitled to deduct tax in payment: General Rules (All Schedules) 19, 21. Sect. 36 applies where interest on a bank overdraft is paid without deduction of tax. The bank being liable to tax on the whole of its profits, tax is thus paid by the bank on interest paid out of income which has already borne tax in the hands of the appellant. If s. 36, sub-s. 1, were not to apply, there would be double taxation, which the statute and rules are designed to obviate. Secondly, there is here a debt to the bank, which is payable not exclusively in Guernsey, but also at the head office in London. It is in London that the profits of the bank from all branches are assessed, and tax paid. The interest is therefore "payable in the United Kingdom" to a bank carrying on business there, and on this ground also the section applies.

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(1) The Income Tax Act, 1918, s. 36, provides: Sub-s. 1: "Where "interest payable in the United "Kingdom on an advance from a "bank carrying on a bona fide "banking business in the United "Kingdom is paid to the bank "without deduction of tax out of "profits or gains brought into "charge to tax, the person by "whom the interest is paid shall "be entitled, on proof of the "facts to the satisfaction of the "Special Commissioners, to re-"payment of tax on the amount "of the interest."

(2) [1936] 2 K. B. 59, 67.

(3) Ibid. 80–82, 89.

Reginald Hills (*Sir D. Somervell A.-G.* with him) for the respondents. There is no question of double taxation here. For that to arise there must be payment by the same person of the same tax on two occasions: *Barnes* v. *Hely Hutchinson.* (1) Greene L.J. pointed out in *Fenton's Trustee* v. *Inland Revenue Commissioners* (2) that the words in s. 36, sub-s. 1, "paid out of profits or gains brought into charge "to tax" must not be misconstrued for the purpose of avoiding double taxation. As to the second branch of the appellant's argument, this interest is not "payable in the "United Kingdom," that is to say, it is not legally due to be so paid. In *Rex* v. *Lovitt* (3) Lord Robson said that the Courts had in certain cases held, "having regard to the "necessary course of business between the parties, that the "bank had in some measure localized its obligations to its "customer or creditor, so as to confine it, primarily at all "events, to a particular branch." *Clare & Co.* v. *Dresdner Bank* (4) is a decision to the same effect. The contract between the bank and its customers is a local contract: *Richardson* v. *Richardson and National Bank of India, Ld.* (5) It follows that s. 36, sub-s. 1, has no application here, for it refers to "an advance from a bank . . . . in the United "Kingdom," and to "interest payable in the United Kingdom," whereas this interest was payable in Guernsey.

Raymond Needham K.C. in reply cited *Prince* v. *Oriental Bank Corporation* (6), in which Sir Montague Smith, delivering judgment and commenting on *Woodland* v. *Fear* (7), said:

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(1) [1939] 1 K. B. 93.

(2) [1936] 2 K. B. 59, 82.

(3) [1912] A. C. 212, 219.

(4) [1915] 2 K. B. 576.

(5) [1927] P. 228.

(6) (1878) 3 App. Cas. 325, 333.

(7) (1857) 7 E. & B. 519; 26 L. J. (Q. B.) 202.

"The case decides no more than this, that the bank came "under no engagement or promise to their customer to honour "his cheques at any branch except that at which he kept "his account." In the same judgment reference is made to *Garnett* v. *M'Kewan* (1) and it is said: "The principle of that "decision affirms the identity of the bank and its several "branches: though separate agencies, the latter were still "agencies of one principal bank, with which alone the plaintiffs "contracted." The authorities cited for the Crown do not affect the general rule that where a customer is debtor to a bank he can tender payment to his creditor (the bank) wherever the creditor has his place of business. Hence s. 36, sub-s. 1, applies and the appellant is entitled to succeed.

WROTTESLEY J. Two arguments are put before me on behalf of the appellant. The first is, that if I look at the Income Tax Act, 1918, s. 36, sub-s. 1, in the light of rr. 19 and 21 of the All Schedules Rules, and bear in mind the way in which those three statutory provisions all work together against what Mr. Needham calls "the enormity of double "taxation," I shall come to the conclusion that, although s. 36 uses the words "interest payable in the United "Kingdom," stress is not to be laid on those words, but on the question whether the interest is paid out of profits or gains which have already borne tax, as is the case here, the bank being taxed on the whole of their earnings whether they are earned in the United Kingdom or not.

If I were to take that attitude, I should be doing that which Greene L.J., though sorely tempted, suggested that it was not right to do, namely, to construe s. 36 in such a way as to leave out the words "in the United Kingdom."

The other argument put forward for the appellant is that the interest which she owed in respect of her overdraft at the branch of the bank in Guernsey is interest "payable in "the United Kingdom," and therefore falls precisely within the terms of s. 36, sub-s. 1. It is common ground in this case that, if that be so, she is entitled to succeed.

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(1) (1872) L. R. 8 Ex. 10.

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SIONERS.

Wrottesley J.

It has to be borne in mind that the National Provincial Bank has its headquarters in London, and therefore prima facie, that any person who owes money to the bank may pay the debt there. It is also perfectly true that either the National Provincial Bank at its headquarters in London, or a manager of one of its branches, might, in concluding an arrangement or agreement with a client, insist on payment locally. Nothing of that kind, however, has happened here.

On behalf of the Crown, my attention has been drawn to two authorities which deal not with the place at which interest is to be paid on a loan granted by the bank, but with the place where the bank can be called on to cash cheques in respect of accounts which have been opened for customers. First, there is *Rex* v. *Lovitt* (1), where Lord Robson, in giving the judgment of the Privy Council, there being no specific agreement as to where the client could call for payment by the bank of money deposited with it, pointed out the difficulties which would arise if the customer could go either into a branch of the bank or to headquarters and expect the bank to cash a cheque, inasmuch as it would mean that in that case "the bank in London might be called on at any time "by a person of whom it would probably know nothing, and "with only a very limited time in which to obtain the detailed "information that would be necessary from the St. John's "branch, to pay 90,351 dollars in London without any "deduction for cost of transmission or any agreement as to "the rate of exchange." Lord Robson then went on to say: "No such obligation appears by express words or necessary "implication in the contract of the parties; and it is very "improbable that it was ever contemplated or intended by "them." A little later he said: "Although branch banks are "agencies of one principal firm, it is well settled that for "certain special purposes of banking business they may be "regarded as distinct trading bodies. Thus, it was held in "*Woodland* v. *Fear* (2) that the obligation of a bank to pay "the cheques of a customer rested primarily on the branch "at which he kept his account, and that the bank in that

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(1) [1912] A. C. 212, 218, 219.

(2) 7 E. & B. 519.

"case had rightfully refused to cash the cheque at another "branch. Commenting on that decision, Sir Montague Smith, "in delivering the judgment of their Lordships' Board in "*Prince* v. *Oriental Bank Corporation* (1), points out that " 'it would be difficult for a bank to carry on its business " 'by means of branches on any other footing, because the " 'officials at one branch do not know the state of a man's " 'account at another branch.' " It is therefore clear that, in the absence of any express arrangement, it is not to be implied from the ordinary relations between banker and customer that the customer can call for his money to be repaid to him at any branch of the bank he likes, without notice.

A further case which was cited for the respondents, is *Clare & Co.* v. *Dresdner Bank* (2), a decision of Rowlatt J. There the plaintiffs, having an account at the Berlin branch of the defendants' bank, which had its head office in Germany and a branch in London, wrote to the London branch demanding payment of the balance due on the account of the Berlin branch. On being refused, they sued the bank without first making a request to the bank in Berlin to pay or remit the balance to London. Rowlatt J. held that the plaintiffs "were "not entitled to demand payment from the London branch "and that there had not been any breach by the defendant "bank of any obligation to the plaintiffs." He said: "As "a rule, no doubt, a debtor has to seek out his creditor and "pay him; but in the case of a bank with several branches, "that cannot be the true relation of the parties. Money "has a different value in different parts of the world even "although it may be expressed in the same currency, and I "cannot conceive it possible that a man who has, we will "say, 1000*l*. sterling to his credit at a bank in New Zealand, "on coming to London would have the legal right to demand "payment of 1000*l*. at an office of the same bank in London "without being liable to pay anything in consideration of "that convenience, or even to give time for the bank in "London to ascertain whether he was in fact a customer

(1) 3 App. Cas. 325.

(2) [1915] 2 K. B. 576, 578.

"of and had a credit balance at the branch in New Zealand." In other words, for the customer of the bank to have the right to walk into a branch of the bank and then and there demand payment, was obviously quite impossible and absurd, and no Court could possibly infer any such right from the relationship between bank and customer.

It is to be observed that in each of those cases the bank owed money to the customer. The bank had not lent money to the customer. It is not suggested either by the Privy Council in *Rex* v. *Lovitt* (1), nor by Rowlatt J. in *Clare & Co.* v. *Dresdner Bank* (2), nor in the case there referred to by Rowlatt J.—*Leader & Co.* v. *Direction der Disconto-Gesellschaft* (3)—that any general rule exists by which transactions between banker and customer automatically have a local character. What was said was that from the mere fact of the relationship between them one could not imply a liability to pay at any branch.

The nature of a branch bank was pointed out by Sir Montague Smith in *Prince* v. *Oriental Bank Corporation* (4), which was cited in *Rex* v. *Lovitt.* (1) Quoting as an instance *Garnett* v. *M'Kewan* (5), he said: "There the "plaintiff had accounts at two branches of the London and "County Bank. His account at branch A was in funds; "his account at branch B was overdrawn. He drew a cheque "upon his account in branch A, where he had funds, and the "bank refused to pay it because his account at branch B "was overdrawn, and the Court held it was justified in so "doing. The principle of that decision affrms the identity "of the bank and its several branches; though separate "agencies, the latter were still agencies of one principal bank, "with which alone the plaintiffs contracted."

It is clear that the appellant in the present case could have insisted on paying the interest, which she owed, at the head office of the National Provincial Bank in London, there being no special arrangement to the contrary, and that that would

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(1) [1912] A. C. 212.

(2) [1915] 2 K. B. 576.

(3) (1914) 31 Times L. R. 83; see also [1915] 3 K. B. 154.

(4) 3 App. Cas. 325, 333.

(5) (1872) L. R. 8 Ex. 10.

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MAUDE v. INLAND REVENUE COMMISSIONERS.

have been a perfectly good tender, for which she could have demanded a proper receipt. That being so, the interest was, in that sense, "payable in the United Kingdom" within the meaning of s. 36, sub-s. 1, of the act of 1918.

Appeal allowed.

Solicitors for appellant: *Wood, Nash & Co.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

F. P. F.

C. A.

1940

Feb. 26, 27, 28, 29.

LIFFEN *v.* WATSON.

Damages—Measure of—Personal injuries—Domestic servant—Loss of board and lodging provided by employer—Provision of board and lodging by father.

As the result of receiving personal injuries in an accident a domestic servant was unable to continue in her employment in which she received 1*l.* a week wages and board and lodging. After the accident she went to live with her father to whom she made no payment for board and lodging. In an action by her against a defendant whose negligence caused the accident:—

Held, by the Court of Appeal, that she was entitled to recover damages, not only in respect of her loss of wages, but also in respect of the loss of board and lodging.

Decision of Stable J. on this point reversed.

Appeal by plaintiff and cross-appeal by defendant from Stable J.

The plaintiff, Lilian Mary Liffen, a domestic servant, claimed from the defendant, John Watson, damages for personal injuries suffered by her owing, she alleged, to the negligence of the defendant in driving a taxicab in which she was a passenger when it skidded and collided with a street refuge. At the time of the accident the plaintiff was in receipt of 1*l.* a week wages and she was given by her employer board and lodging valued at 25*s.* a week. On her discharge from hospital after the accident she was unable to continue in her employment and she went to live at the house of her father to whom she made no payment for board and lodging. Part of the damage complained of by the plaintiff in the action was—(*a*) loss of wages at the rate of 1*l.* a week, and (*b*) loss of board and lodging at the rate of 25*s.* a week. Stable J., in giving judgment for the plaintiff for 1155*l.* damages and costs, awarded her damages for loss of wages, but he refused to award her any damages for loss of board and lodging on the ground that she had not lost her free board and lodging as the result of the accident because it was being provided for her by her father and that there was no evidence of any promise by her to pay her father for her board and lodging. The plaintiff appealed on the ground that the damages awarded by Stable J. were insufficient and the defendant cross-appealed on the ground that they were excessive.

Beyfus K.C. and *J. Alan Bell* for plaintiff.
Serjeant Sullivan K.C. and *Beney* for defendant.

SLESSER L.J. [having dealt with matters raised on the appeal which do not call for report and said that there must be a new trial, continued :] If the judge at the new trial comes to the conclusion that the plaintiff's contract with her employer was, as she alleges, that she should be paid a certain amount of wages in cash and given certain benefits in the shape of board and lodging in kind—a payment which is expressly excepted from the Truck Acts in the case of a domestic servant—there is no reason why, in the assessment of damages, the loss of the board and lodging should not stand on the same footing as the loss in cash of the wages. If, since the plaintiff's discharge from hospital, her father has provided her with board and lodging in his home, that is no reason why she should not be heard to say that her loss of the board and lodging previously provided by her employer was as much a loss to her as if she had lost the actual sum in money. It has been said that there is no authority on this matter. None is needed. It is a matter of general principle, but I would observe that in *Banco de Portugal* v. *Waterlow & Sons, Ld.* (1), there is to be found expressed the general principle that a wrongdoer must recompence a plaintiff for all the damage which naturally flows from the wrongdoing. In my opinion, there should be a new trial, and all questions of damages as distinct from liability should be open to evidence on both sides.

LUXMOORE L.J. I agree.

GODDARD L.J. I agree. Stable J. refused to allow the plaintiff any damages in respect of her loss of board and

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lodging because he found no evidence that she had entered into a contract to pay her father for the board and lodging he afforded her. In my view, Stable J. was wrong in so doing. The question whether the plaintiff was entitled to recover damages under that head from the defendant does not depend on whether or not she had made a contract for board and lodging with some one else. The plaintiff lost her right to the board and lodging provided by her employer because she was rendered by the accident unfit to work. It does not matter whether after the accident she was taken in by her father or by a friend to whom she might say: "I cannot make a "contract with you, but I will pay you something if I recover "damages." The only consideration is what the plaintiff lost. She lost the value of the board and lodging just as she lost her wages and she is entitled to be compensated for that loss. What she does with the compensation when she receives it is a matter for her and nobody else. If she likes to pay her father for the board and lodging he has given her, she can do so. Perhaps he has got some claim on her, but, however that may be, what is done with the compensation cannot affect the question which we have to decide.

New trial ordered.

Solicitor for plaintiff: *H. G. Greenwood.*
Solicitors for defendant: *A. E. Wyeth & Co.*

G. F. L. B.

MENZIES *v.* UNITED MOTOR FINANCE CORPORATION.

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Feb. 7.

Hire purchase—Motor-car—Plaintiff's wish for loan on security of car—Purported sale of car to dealer and resale to defendants—Hire-purchase agreement relating to car—Failure to pay instalments of hire-rental—More than one-third of total rental paid—Seizure of car by defendants—Whether hire-purchase price less than 50l.—Plaintiff's right to recover instalments paid—Hire Purchase Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 53), *ss.* 1, 11, 20.

The plaintiff being desirous of obtaining a loan of 30*l.* on the security of her car went to a dealer in cars who purported to buy the car and sell it to the defendants. The defendants as owners then entered into a hire-purchase agreement with the plaintiff as hirer in relation to the car. The agreement stated that the hirer had made a first payment of 25*l.* in consideration of the option to purchase the car contained therein and that she agreed to pay twelve monthly instalments of hire-rental amounting to 37*l.* The defendants had paid the dealer 33*l.* for the car, of which 2*l.* 10*s.* was retained as commission and 30*l.* 10*s.* paid to the plaintiff. The plaintiff never paid or was asked to pay the sum of 25*l.* mentioned in the agreement, or, as stated in the plaintiff's proposal for a hire-purchase agreement, deposited this sum with the dealer. The plaintiff's payments of hire-rental fell into arrears when seven instalments had been paid, and thereupon the defendants seized the car. The plaintiff then brought this action for a declaration that the hire-purchase agreement was determined and for repayment of the instalments she had paid :—

Held, (1.) that whether the transaction was treated as sham or genuine, the hire-purchase price was under 50*l.*, seeing that the payment of 25*l.* was never made ; (2.) that by virtue of s. 1 (*a*) and s. 20, sub-s. 1, of the Hire Purchase Act, 1938, s. 11, applied to this agreement ; and (3.) that the act of the defendants in obtaining possession of the car otherwise than by action was a breach of s. 11, sub-s. 1, with the result that under sub-s. 2 the agreement was determined and the plaintiff entitled to recover the total sum paid to the defendants under the agreement.

APPEAL from Deputy Judge Sturges, sitting at Marylebone County Court.

The plaintiff, Amelia Menzies, was the owner of an 8 h.p. Morris car and in October, 1938, she became desirous of obtaining a loan of 30*l.* on the security of the car. She was put by her brother-in-law into communication with one Rigg, who said he could arrange the matter, but that it must go through the Church Street Garage. The form the transaction took was that the garage purported to buy the car and to sell it to the defendants.

The plaintiff had produced to her by Rigg a proposal form for a hire-purchase agreement by which she offered to enter into a hire-purchase agreement for acquiring the motor-car and stated that she had deposited cash for the first payment with the garage. The printed form then continued: "If you "decide to accept this proposal please purchase the vehicle "and have delivery made to me/us." This document was dated October 17, 1938, and the hire-purchase agreement was dated October 18, 1938. On the same day in a letter headed "Hirer: Miss A. Menzies, Vehicle: Morris Saloon, "Makers' No.: 105560," the defendants wrote to the garage as follows: "We have pleasure in accepting your offer to sell "the above vehicle to us and enclose cheque in payment "therefor. We also have pleasure in notifying you of our "acceptance of the hire-purchase proposal made by the "above-mentioned proposed hirer and we duly request you "to deliver the vehicle to the hirer to whom a copy of the "agreement is being sent direct . . . ."

By the hire-purchase agreement the defendants (called the owners) agreed to let to the plaintiff (called the hirer) the vehicle and accessories described in the schedule, being the Morris car mentioned above, upon the conditions therein contained. By clause 2 the hirer agreed (amongst other things) (A) on the signing of the agreement to pay to the owners the amount of the first payment mentioned in the schedule (being 25*l.*) in consideration for the option to the purchaser thereafter given; (B) to pay to the owners so long as the hiring should continue the monthly hire rentals set out in the schedule (being twelve monthly instalments of 3*l.* 1*s.* 8*d.*, making together 37*l.*). By clause 3 the owners agreed that if the hirer should have duly made all the said payments and otherwise observed and performed all the terms and conditions of the agreement she was to have a month's option to purchase the vehicle for 5*s.* Clause 4 provided that, if during the hiring the hirer should make default in punctual payment of any sum due to the owners under the agreement, it should be lawful for the owners to determine the hiring by notice in writing or by retaking possession of the vehicle and that in the event of the hiring being determined under this clause the hirer was to pay to the owners the balance of all hire rental which would have become due if the hiring had continued for the full period.

The payments of the monthly instalments having fallen into arrears the defendants seized the car, and in these circumstances the plaintiff brought these proceedings, claiming (amongst other things) (1.) a declaration that the hire-purchase agreement was determined; (2.) the return of the seven instalments of monthly rental amounting to 21*l.* 11*s.* 8*d.* paid by her to the defendants.

The evidence was that the plaintiff had never paid to the Church Street Garage or to the defendants the sum of 25*l.* mentioned in the hire-purchase agreement, that the sum paid by the defendants to the Church Street Garage was 33*l.*, of which 2*l.* 10*s.* was retained by Rigg as commission and 30*l.* 10*s.* paid to the plaintiff; and that the defendants were entirely unaware that the transaction was not a genuine one.

The county court judge said that there was a rogue somewhere, but that the defendants knew of nothing wrong. He thought the proposal was brought about by Rigg's fraud, that he was an agent of the Church Street Garage, and that the garage might have been agents for the defendants. He held that the proposal form was filled up by the plaintiff owing to Rigg's fraudulent statement as to the deposit, but fraud was not pleaded. Therefore judgment could not be given on the ground of fraud. There was no evidence to show that Rigg was an agent of the defendants. The plaintiff appeared to have been defrauded but not by the defendants. He therefore gave judgment for the defendants.

The plaintiff appealed. The appeal was heard on February 7, 1940.

Helenus Milmo for the appellant. The question raised on this appeal is whether the hire-purchase agreement comes within the Hire Purchase Act, 1938, and, if it does, the plaintiff must succeed in her claim to recover the instalments of hire rental she had paid. The whole thing here was a ramp worked by Rigg and the garage proprietor, for in point of fact the plaintiff never sold her motor-car to the garage proprietor and no property in the car ever passed to the defendants.

[GODDARD L.J. If the plaintiff lent herself to the transaction she cannot say that the car did not become the defendant's property.]

The main question here is whether the hire-purchase agreement came within the Act of 1938. If so, the defendants on any footing committed a breach of s. 11, sub-s. 1, of the Act by seizing the car and not proceeding to obtain possession of it by action ; and then the result follows under sub-s. 2 that as more than a third of the hire-purchase price had been paid, the hire-purchase agreement was thereby terminated and the hirer can recover the instalments of the hire-purchase price paid to the defendants. By s. 22, sub-s. 2, the Act of 1938 only came into force on January 1, 1939, a date subsequent to the date of the hire-purchase agreement, but by s. 20, sub-s. 1, certain sections, which included s. 11, were made applicable to hire-purchase agreements made before the commencement of the Act, if the seizure of the goods was made after the commencement of the Act. Here the car was not seized till July 8, 1939. It has to be remembered, however, that s. 1 limits the application of the Act to hire-purchase agreements relating to motor-cars to cases where the purchase price does not exceed 50*l*. Here it is said that the purchase price was 62*l*. and not 37*l*., as the agreement provided for a first payment of 25*l*. that has to be added to the twelve instalments of 3*l*. 1*s*. 8*d*. In fact, however, the sum of 25*l*. was never paid by the plaintiff or demanded of her by the defendants, and the application of the Act cannot be excluded by putting in a false amount additional to the payments actually agreed to be paid. It is suggested that 25*l*. was paid to the garage proprietor, but there is no truth in this. Viewed as a genuine transaction, what the defendants did was to pay 33*l*. for the car and to let it on hire-purchase for twelve monthly instalments amounting to 37*l*. Sect. 11 of the Act is therefore applicable. [He was stopped.]

H. V. Lloyd-Jones for the respondents. In the proposal form the plaintiff says that she deposited 25*l.* with the motor dealer as a first payment in respect of the proposed hire-purchase agreement. When she had done that the defendants, who had no knowledge of anything unusual in the transaction, sent a cheque to the dealer for 33*l.* In their view the purchase price was 58*l.*, but they did not send the further 25*l.* as they believed the garage proprietor had already received this amount from the plaintiff. They treated that as paid to the proprietor as part of the purchase price of the car and therefore paid only 33*l.* That is the obvious business sense of the matter. There was no object in obtaining a cheque for 25*l.* from the garage proprietor and then paying him 58*l.*

[GODDARD L.J. The letter of October 18, 1938, from the defendants to the garage proprietor shows that the car was being purchased for 33*l.*]

The true purchase price was 25*l.* plus 33*l.*, and all that was being done was to avoid multiplicity of cheques. The result is that the hire-purchase agreement was for 62*l.* and not 37*l.* The 25*l.* had been paid to the garage proprietor and the defendants gave themselves credit for that by paying him only 33*l.* It follows that the Hire Purchase Act, 1938, does not apply to this agreement.

[No reply was called for.]

SLESSER L.J. In this case a lady named Amelia Menzies sought to recover certain payments which she had made in connection with a very curious and complicated transaction in relation to a motor-car which was originally hers. For the purpose of this case, however, I will assume, as the learned judge appears to have assumed, that the defendants as owners in reality hired to the plaintiff the motor-car. On that assumption, the claim which she now makes is this: that she should recover the sum which she has paid as instalments under a hire-purchase agreement of October 18, 1938.

The question to be determined in this case is whether in the circumstances she is protected from what happened, in the events which I shall detail, by the Hire Purchase Act,

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1938. This lady having agreed to pay a sum of 37*l.* by twelve monthly rentals of 3*l.* 1*s.* 8*d.* each on the 17th day of each month, beginning in the month of October, 1938, fell into arrears with her instalments. Relying upon their powers, if they be applicable, under the memorandum of agreement, the persons described in that memorandum of agreement as owners of the motor-car, the United Motor Finance Corporation, Ld., on July 8, 1939, retook possession of, or as they say, collected, the motor-car.

Sect. 20 of the Hire Purchase Act, 1938, provides that certain sections of that Act shall apply "in relation to all "hire-purchase agreements, whether made before or after "the commencement of this Act." The Hire Purchase Act was passed on July 29, 1938; and it was provided by s. 22, sub-s. 2, that the Act should come into force on January 1, 1939. Therefore, the Act as a whole was not in force at the time of the making of this agreement; but, by virtue of s. 20, the relevant sections which we have to consider here were made operative retrospectively and affect this agreement. That being so, the particular section we have to consider here, which is s. 11, provides by sub-s. 1: "Where goods "have been let under a hire-purchase agreement, and one-third "of the hire-purchase price has been paid . . . . the owner shall "not enforce any right to recover possession of the goods "from the hirer otherwise than by action." In such case it is provided by sub-s. 2 of s. 11: "If an owner recovers "possession of goods in contravention of the foregoing sub-"section, the hire-purchase agreement, if not previously "determined, shall determine and (*a*) the hirer shall be released "from all liability under the agreement"; and then follow these words, on which the appellant here relies: "and shall "be entitled to recover from the owner in an action for money "had and received all sums paid by the hirer under the "agreement . . . . in respect thereof."

The only answer which can be made to the claim of the appellant here to recover the instalments paid by the hirer, is to be found in the argument that the relevant sections do not apply to this case by reason of the provisions of s. 1 of

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the Act, which says: "This Act shall apply in relation to all "hire-purchase agreements, and credit-sale agreements under "which the hire-purchase price or total purchase price, as "the case may be, does not exceed (*a*) where the agreement "relates to a motor vehicle . . . . the sum of fifty pounds." It is contended here by the respondents, and was contended in the court below, that this agreement did relate to a hire-purchase transaction in which the price was more than 50*l*. The hire-purchase price is defined in s. 21, sub-s. 1, as follows: "'Hire-purchase price' means the total sum payable by the "hirer under a hire-purchase agreement in order to complete "the purchase of goods to which the agreement relates." I, therefore, look to the memorandum of agreement in this case to see what was the total sum payable by the hirer under the hire-purchase agreement. To my mind that appears quite clearly in the agreement thus: "The total hire rent "payable by twelve monthly rentals of 3*l*. 1*s*. 8*d*. each on the "17th day of each month commencing in the month of "October, 1938, 37*l*." The total liability payable under this hire-purchase agreement was 37*l*.; and, therefore, came within the ambit of s. 1 (*a*) of the Hire Purchase Act.

It is said that the total sum was not 37*l*., but 62*l*.; and the reason for that contention is this. In the agreement it is provided by clause 2: "On the signing hereof the hirer "agrees to pay to the owners the amount of the first payment "set out in the schedule hereto as consideration for the option "to purchase hereinafter given." In reality no such moneys were paid at any time by the appellant to the United Motor Finance Corporation. In the schedule attached to the document to which I have just referred, there is the figure of 25*l*. under the description "first payment." But in truth and in fact this first payment was never made to the United Motor Finance Corporation, Ld., and formed no part of the hire-purchase agreement.

It may well be that where persons are hiring with an option of purchase from somebody else for a first payment down and subsequent payments by instalments, the first sum paid down may be, and very likely would be, a part of the total sum payable under the hire-purchase agreement. The sum is not limited, and there is no reason why it should be limited to the instalments. It may include some initial sum paid down. But on the facts of this particular case, the United Motor Finance Corporation, Ld. (who describe themselves as, and I will assume for this purpose that they are, the owners) never received from the hirer this sum at all, which was notionally paid, if I may use that expression, to a third party; and, therefore, it never was at any time a part of the payments under the hire-purchase agreement.

The learned judge, as I understand his judgment, has been influenced by a consideration of the value of this car: but that is a matter which is entirely irrelevant to anything to be considered here. The only question to be considered here is what was the hire-purchase price. It is clear beyond question that the hire-purchase price was 37*l.*, no more and no less; and consequently, being within the Act, this company has unlawfully, contrary to s. 11, attempted to enforce a right to recover possession of the goods from the hirer otherwise than by action. It follows that the hirer is now not only released from liability under the agreement, but is entitled to recover from the owner the money which has been paid under the agreement. As that is the claim the hirer here makes, in my opinion she brings herself directly within the rights conferred on her by s. 11 of the Act; and, therefore, this appeal succeeds, and she should have judgment for the amount claimed.

LUXMOORE L.J. The plaintiff in this action was the owner of the car; and she wanted to borrow a sum of 30*l.* or thereabouts on the security of the car. In order to enable her to do so, it was represented that she was buying the car for a sum of money from a motor dealer; that she had paid the motor dealer 25*l.*; and owed him on the car the sum of 33*l.* No such transaction had in fact ever taken place. She did not owe the motor dealer anything. The motor dealer represented to the United Motor Finance Corporation that he had received 25*l.*, and that the balance of 33*l.* was due; and he offered to sell to the Finance Corporation the motor-car for 33*l.*, and the Finance Corporation agreed to buy it at that price. It was in respect of that purchase price that the United Motor Finance Corporation represented themselves to be the owners of the car and, as such owners, they purported to sell the car to the plaintiff for a sum which was to be paid by instalments representing a total of 37*l.* There was in fact no first payment to the Finance Corporation of 25*l.*; nor is the statement in the hire-purchase agreement that "on the "signing hereof" the lady was to pay to them 25*l.*, or any other sum, as a first payment, in any way a correct representation of the facts. The Finance Corporation knew quite well that they were not to receive 25*l.*, and that the lady was not going to pay it. All they were going to get under the hire-purchase agreement was 37*l.* by twelve monthly instalments.

In those circumstances, I agree that it is quite impossible to say that the 25*l.* is any part of the hire-purchase price, having regard to the definition of that phrase which is contained in s. 21 of the Hire Purchase Act. That being so, the hire-purchase agreement is a hire-purchase agreement for a sum under 50*l.*, and the Act applies. I agree entirely with what my Lord has said with regard to the application of this section to this particular case; and I am satisfied that the learned judge was in error in dismissing the plaintiff's claim, and that the plaintiff is entitled on this appeal to judgment for 21*l.* 11*s.* 8*d.*

GODDARD L.J. I propose to add a few words of my own, because the case seems to me to be one of some importance. I think this is the first time on which the Hire Purchase Act, 1938, has been considered in this Court; at any rate, it is so far as I know the first time that it has been considered in relation to what is generally called nowadays hire-purchase finance.

It has fallen to my lot, when sitting in the King's Bench Division, to have had to try many cases arising out of hire-purchase finance, and I have always found that many of

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the difficulties which occur in those cases become clear when the true nature of the transaction is thoroughly understood. It is a comparatively recent development in commercial transactions which has been imported, I think, from America. It is only in recent years that extensive use has been made of it. It is important to understand the distinction that exists in fact between these hire-purchase cases where "the "owner of the goods," to use the expression of the Act, is a hire-purchase company, and the ordinary transaction of hire purchase which takes place where the owner of the goods is a shopkeeper who is selling the goods on hire purchase. In that case, as in the old case with which we are all familiar, of *Helby* v. *Matthews* (1), and that class of case, the shopkeeper or dealer in the goods himself enters into a contract of hire purchase with the would-be purchaser. Supposing he is selling 100*l.* worth of furniture, it is a common thing to find that he stipulates for a first payment of, say, 20*l.*, and so many monthly instalments of stated sums. The hire-purchase price in those circumstances, of course, is 100*l.* The buyer pays down 20*l.*, and has to pay so many monthly instalments.

Nowadays, largely due to the desire of people who cannot pay for them in a lump sum to buy motor-cars, electrical refrigerators and vacuum cleaners, or other household equipment, the system was evolved by which they would be enabled to buy these things, which they could not afford to pay for at once, from dealers who, however, also could not afford to wait for their money. When one is considering this hire-purchase finance one has to remember that the whole object of the business is to finance the dealer. It is not the case then of a dealer in the goods entering into a hire-purchase agreement with a would-be buyer of the goods.

I am going to deal with this case for the purposes of my judgment exactly as though this was a genuine hire-purchase agreement by this lady; and as though there had not been all this humbug, I do not know whether it is fraud, on the part of this man Rigg, and on the part of the garage dealer. I am going to deal with it as though it was an ordinary transaction entered into by a lady who wanted to buy a car from the garage. What happens then? The car dealer cannot afford to wait for his money, when the car is sold on the instalment system, and so he goes to one of these corporations who are prepared to finance the transaction. In essence the transaction is a loan of money by the Finance Corporation to the dealer. The question of how much the dealer wants is entirely a matter for the dealer. If the dealer is selling a car for, say, 200*l.*, it may be that he will take a payment down, and that the customer can afford to pay 50*l.*, so the dealer then wants to be financed to the extent of 150*l.* The way the transaction is worked is, that the dealer purports to sell the car to the finance company, and the finance company then purports to let the car on hire purchase to the would-be customer. The hire-purchase company acquire the property in the car, which they have to let, not for 200*l.*, but for 150*l.* That is what they pay to the dealer. They are interested in the total price that is to be paid for the car; because it is to their interest to know that there is what I may call a good and valuable car, because their security for getting their money back is all the greater. It may be that if they found that the dealer was selling the car for 150*l.* and wanted 150*l.*, they would not lend the money, any more than an intending mortgagee would lend up to the full value of the mortgaged property. But the first payment made in those circumstances is made to the dealer. He retains that money. It is his money, and he keeps it for himself. The finance company have not any right to recover that money from the dealer. They cannot bring any action against him. He has not received it for their use: he has received it for his own use. What in truth he has done is this. He has borrowed the balance from the hire-purchase company, and their true interest in the transaction is the loan which they have advanced to the dealer. So here, when you are considering what, for the purposes of this Act, is the hire-purchase price, and you find the Act says "'Hire-purchase price' means the total "sum payable by the hirer under a hire-purchase agreement,"

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(1) [1895] A. C. 471.

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that must mean the total which he pays to the person with whom he is entering into the agreement.

The total price which the plaintiff was paying here was the price which the hire-purchase company had advanced, plus charges and plus interest, namely, 37*l*. In fact, it is not arguable that the sum payable here was any other sum than 37*l*. The fact that they chose to put into their agreement that a first payment had been made, is neither here nor there. If they say it has been made to them, they are saying something which is not true. The first sum was paid to the dealer; it remains the dealer's property; and nobody but the dealer is interested in the money.

In my opinion it is perfectly clear that the hire-purchase price which was paid in this case was not 62*l*. but 37*l*. The Act, therefore, applies; and I agree with my Lord that the plaintiff is entitled to the relief which she seeks.

Appeal allowed.
Leave to appeal to House of Lords refused.

Solicitors: *Lewis & Raynes; Kinch & Richardson, for Barrett & Thomson, Slough.*

H. C. G.

RUBIE *v.* FAULKNER.

1940
Jan. 19.

Motor-car—Driving licence—Provisional licence—Supervision of holder by experienced driver—Duty of supervisor—Avoidance of accident—Motor Vehicles (Driving Licences) Regulations, 1937 (*St. R. & O.,* 1937, *No.* 438), *reg.* 16 (3.) (*a*).

The appellant, while in a motor vehicle driven by the holder of a provisional licence (a "learner-driver") who was driving under his supervision in accordance with reg. 16 (3.) (*a*) of the Motor Vehicles (Driving Licences) Regulations, 1937, was in a position to see that the driver was about to overtake another vehicle by pulling considerably to the offside at a pronounced bend of the road, but he neither said nor did anything to prevent it. An accident having occurred and the driver having been convicted of driving without due care and attention :—

Held, that the appellant was rightly convicted of aiding and abetting the driver in the commission of the offence.

Per Hilbery J. The regulation is framed to make some provision for the protection of the public against the dangers to which they are exposed through a car being driven on the road by a driver who is still a learner and therefore assumed to be not fully competent . . . . The supervisor must be intended by the regulation to have the duty, by supervision, of making up as far as possible for the driver's incompetence. In other words, it is the supervisor's duty, when necessary, to do whatever can reasonably be expected to be done by a person supervising the acts of another to prevent that other from acting unskilfully or carelessly or in a manner likely to cause danger to others, and to this extent to participate in the driving.

Case stated by justices.

At a court of summary jurisdiction at Saffron Walden, Essex, an information was preferred by the respondent, Superintendent Harry George Faulkner, against the appellant, George Crowhurst Rubie, charging the appellant that he, on March 29, 1939, at Quendon, Essex, unlawfully did aid, abet, counsel and procure, contrary to s. 5 of the Summary Jurisdiction Act, 1848, Percy Evans James, unlawfully to drive a motor vehicle without due care and attention, contrary to s. 12 of the Road Traffic Act, 1930. The information was heard on April 18, 1939, when the appellant was convicted and fined 10*s*.

On the hearing of the information the following facts were proved or admitted :

On March 29, 1939, Percy Evans James was driving a motor vehicle owned by him on the road leading from London to Newmarket, in the parish of Quendon. He was the holder of a provisional licence issued to him under s. 5, sub-s. 3, of the Road Traffic Act, 1930, and at the material time the motor vehicle displayed the appropriate distinguishing marks as provided for by reg. 16 (3.) (*c*) of the Motor Vehicles (Driving Licences) Regulations, 1937. The appellant was present in the motor vehicle with James at the material time in pursuance of reg. 16 (3.) (*a*) of the regulations (1), and as a competent driver had undertaken, at the request of James to act as " supervisor " in accordance with that regulation. On a pronounced bend, where the road was 22 feet wide, with a white line in the centre, James drew out from behind, and attempted to overtake, a horse and cart which he was following, being unable, owing to the bend, to see a motor lorry which was approaching from the opposite direction on its proper side of the road. The engine of his motor vehicle stopped, leaving the vehicle well over the centre of the road, and a collision occurred owing to the proximity of the motor lorry and the fact that the engine stopped. The appellant, who had been a driver of motor vehicles for twenty years, was sitting in the passenger's seat on James's left-hand side and saw the horse and cart and the white line in the centre of the road. Further, he was in a position to see that James was about to overtake the horse and cart on the pronounced bend, for that purpose taking the motor vehicle to its offside of the white line. James was convicted of driving the motor vehicle without due care and attention.

The justices were of opinion that it was the duty of the appellant to have told James not to attempt to pass the

(1) By reg. 16 (3.) of the Motor Vehicles (Driving Licences) Regulations, 1937: "A provisional "licence shall be granted only "subject to the condition that "until the holder thereof has "passed the appropriate test— "(*a*) he shall . . . . use it only "when under the supervision of "the holder of a licence other than "a provisional licence who has "been the holder of a licence for "at least two years or has passed "a test under s. 6 of the [Road "Traffic Act], 1934, who shall be "present in the vehicle with "him. . . . ."

horse-drawn vehicle at the place in question immediately James showed that he intended to do so, and that by his passive conduct the appellant aided and abetted James to commit the offence. Consequently, they held that the contention of the respondent was right in law, and that the appellant had committed the offence with which he was charged.

The appellant appealed.

C. B. Marriott K.C. and *L. A. Vine* for the appellant. The appellant was wrongly convicted because there was no evidence that he failed to do anything which he reasonably and properly might have been expected, and had time and opportunity, to do. His position was purely supervisory ; his relationship to James was not that of master and servant ; and he, therefore, could not be said to be in control of the vehicle as was the appellant in *Du Cros* v. *Lambourne* (1), which, on that ground, is distinguishable. He was a mere volunteer with no interest except to help James with advice.

George Pollock for respondent. The appellant saw what James was doing and took no steps to stop him. He, therefore, failed in his duty of supervision and is guilty of the offence charged against him.

LORD HEWART C.J. Reg. 16 (3.) (*a*) of the Motor Vehicles (Driving Licences) Regulations, 1937, clearly provides that there must be a person with experience in driving motor-vehicles under whose supervision the holder of a provisional licence is acting and without whose presence and supervision it is not lawful for him to drive a motor vehicle on the highway. The regulation contemplates a duty and the presence of a person, properly to be called a supervisor, who is to perform that duty, and the duty is obviously comprised in the task of supervision.

Before the justices it was contended on behalf of the appellant that he was acting in accordance with reg. 16 (3.) (*a*) of the regulations and did not have physical control

(1) [1907] 1 K. B. 40.

over the vehicle; that there was no evidence to prove that he had instructed Mr. James to do what he did; and that he had no time to correct any carelessness on James's part and therefore had committed no offence under s. 5 of the Summary Jurisdiction Act, 1848. That series of contentions is interesting not only for what it says, but also for what it omits. There is no suggestion that the appellant, who had undertaken the responsible task of supervision, did or said anything. He might just as well not have been there, in which case it would not have been lawful for James to be driving a motor-vehicle on the highway.

In this Court it appeared to be argued that, partly because the time occupied by the events leading to the accident had been so short, the appellant was not called on to do or to say anything, but was justified in what the justices described as his " passive conduct." That argument gives the go-by to the obvious intention of the regulation. The condition on which the holder of a provisional licence is allowed to drive a motor-vehicle on a highway is that he is under the supervision of an experienced driver. The very essence of the matter is that there should be a supervisor competent to supervise. The duty being clear on the face of the regulation, it was a pure question of fact for the justices to decide whether that duty had been performed.

It seems to me that it was open to the justices to find that the appellant, by his passive conduct in circumstances which required him to be active, if only by exclaiming : " Keep in ! ", failed to discharge the duty which he had undertaken, and thus was guilty of the offence with which he was charged. In my opinion, therefore, this appeal should be dismissed.

HILBERY J. I agree. The regulation is framed to make some provision for the protection of the public against the dangers to which they are exposed through a car being driven on the road by a driver who is still a learner and therefore assumed to be not fully competent. It is, I can only suppose, because a learner-driver is assumed to be not fully competent that the regulation provides that a supervisor shall accompany him. This being so, the supervisor must be intended by the regulation to have the duty, by supervision, of making up as far as possible for the driver's incompetence. In other words, it is the supervisor's duty, when necessary, to do whatever can reasonably be expected to be done by a person supervising the acts of another to prevent that other from acting unskilfully or carelessly or in a manner likely to cause danger to others, and to this extent to participate in the driving.

In this case it was found that the supervisor could see the driver was about to do the unlawful act of which he was convicted and the magistrates found that the supervisor remained passive. There is no hint in the case that the supervisor in evidence ever asserted that he did anything. For him to refrain from doing anything when he could see that an unlawful act was about to be done, and his duty was to prevent an unlawful act if he could, was for him to aid and abet.

HALLETT J. I agree and desire only to make it plain that, like both the other members of the Court, I base my judgment on the consideration of the duty owed to the public under the regulation. If, hereafter, it is attempted to be argued in some civil action that the maxim respondeat supervisor be added to the well known maxim respondeat superior, different considerations may arise which will have to be dealt with.

Appeal dismissed.

Solicitors for appellant: *Amery-Parkes & Co.*

Solicitor for respondent: *Prosecuting Solicitor, County Hall, Chelmsford.*

1940
Jan. 16, 17;
Feb. 9.

TREBANOG WORKING MEN'S CLUB AND INSTITUTE, LIMITED *v.* MACDONALD.

MONKWEARMOUTH CONSERVATIVE CLUB, LIMITED *v.* SMITH.

Licensing—Incorporated club—Shareholders and members of club identical—Supply of intoxicating liquor to members—"Sell"—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *and* 1 *Geo.* 5, *c.* 24), *s.* 65, *sub-s.* 1.

Where a non-proprietary club purchases intoxicating liquor by an agent who holds it as agent or trustee for the members of the club, the supply of the liquor to individual members of the club does not constitute a sale thereof within the meaning of s. 65, sub-s. 1, of the Licensing (Consolidation) Act, 1910.

Two members' clubs were incorporated under the Industrial and Provident Societies Acts and the Companies Acts respectively, the shareholders and the members in each case being identical. They purchased intoxicating liquor and supplied it from time to time to individual members for payment as in an ordinary club:—

Held, that the incorporated societies were legal entities as distinct from the members, and could therefore act as their agents or trustees, the real interest in the liquor being in the members, so that the societies did not require to be licensed.

Graff v. *Evans* (1882) 8 Q. B. D. 373 applied.

CASE stated by the stipendiary magistrate at Pontypridd.

At a court of summary jurisdiction sitting at Porth, the respondent, William Macdonald, superintendent of police, preferred an information against the appellant society, the Trebanog Working Men's Club and Institute, Ld., for having on December 10, 1938, unlawfully sold by retail certain intoxicating liquor, the society not then holding a justices' licence authorizing it to hold an excise licence for the sale of that liquor, contrary to s. 65 of the Licensing (Consolidation) Act, 1910.

On the hearing the following facts were admitted: The appellant society was registered under the Industrial and Provident Societies Acts, 1893 to 1913, on April 1, 1922, and its objects, as set out in r. 1 of its rules, in which it was referred to as "the club," were "to carry on the business "of club proprietors, by providing for the use of its members, "and for such associates . . . . as are admitted to honorary "membership, the means of social intercourse, mutual helpfulness, mental and moral improvement, rational recreation, "and the other advantages of a club." The club was carried on at Brock's Terrace, Trebanog, which was also the society's registered address. Intoxicating liquor was purchased in the name of the society on the authority of the committee referred to in r. 17, sub-r. 5, and paid for by cheque drawn on the banking account of the society, and the liquor was served to its members in return for money payments. There were no shareholders who were not members of the club. On December 10, 1938, police officers entered the premises at 9.15 P.M. under a search warrant. They found there forty-four persons, all of them members of the society, and sixteen honorary members. Between 9.15 P.M. and 10 P.M. intoxicating liquor was served to some of the members and honorary members in exchange for money payments.

The magistrate convicted the appellant society, but stated this case.

Blanco White K.C. and *Arthur Forbes* for the appellant society. The magistrate was wrong. In its conduct this was in all respects an ordinary club. The general position of clubs is shown in *Graff* v. *Evans* (1), which establishes that in a bona fide club there is no sale to individual members but a transfer by each member to the member ordering a drink of his share or interest in it, the property or interest in the whole of the liquor being in all the members. The appellant society was a legal entity apart from its members and in purchasing the liquor it became the proprietor thereof, but it held that liquor only as a trustee for the members. In *Newell* v. *Hemingway* (2), in which the facts were indistinguishable from those in the present case, except that the manager was the person charged, the conviction was quashed. There the point was clearly taken that the club was a legal entity and "sold" the liquor to the members. This is not a proprietary company carrying on the club for profit, for by r. 22

(1) 8 Q. B. D. 373. (2) (1888) 53 J. P. 324; 58 L. J. (M. C.) 46.

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no profits are to be distributed among the members. Where, as in *National Sporting Club, Ld.* v. *Cope* (1) a limited company composed chiefly, but not exclusively, of members of a club, carries on a club as a business it must have a licence. [*Bowyer* v. *Percy Supper Club, Ld.* (2) was also referred to.] The society being a legal entity, could act as an agent, and in this case did so act for the members, who must act by an agent, and the members distributed the liquor among themselves as in *Graff* v. *Evans.* (3) The society was the legal owner of the liquor, but the club members had at least such an interest in it that each could transfer that interest to the member ordering a drink. In *Wurzel* v. *Houghton Main Home Delivery Service, Ld.* (4) the point that the company was acting as an agent was not taken.

J. W. Morris K.C. and *Morgan Evans* for the respondent. Unless it can be said that *Graff* v. *Evans* (3) governs this case, there was clearly a sale here by the society which was a legal entity apart from its members and the legal owners of the liquor provided for members who ordered drinks. *Graff* v. *Evans* (3) was the case of the ordinary members' club whose property is that of all the members. Here the property was in the society and was paid for by cheque drawn on their banking account. There is nothing in the rules to show that they did not obtain the property absolutely ; there is nothing about agency or trusteeship. In *Graff* v. *Evans* (3) the rules vested the club's property in trustees. *Newell* v. *Hemingway* (5) may be explained by the fact that it was not the limited company but their manager who was prosecuted, it being apparent that it was not he who had "sold." Swift J., referring to *Newell* v. *Hemingway* (5) in *Wurzel* v. *Houghton Main Home Delivery Service, Ld.*, said (6): "I do not think "that in that case sufficient attention was paid to the "difference which exists between a proprietary club and a "members' club."

[LORD HEWART C.J. I must not be taken to have acquiesced in that observation of Swift J.]

(1) (1900) 16 Times L. R. 158.
(2) [1893] 2 Q. B. 154.
(3) 8 Q. B. D. 373.
(4) [1937] 1 K. B. 380.
(5) 53 J. P. 324.
(6) [1937] 1 K. B. 380, 394.

Wurzel's case (1) illustrates the difference in the considerations applying to unincorporated and incorporated bodies. There were two appeals on identical facts, the question being whether a vehicle used for carrying coal for payment to the homes of the members of the bodies in question had been used " for hire or reward." In the case of the unincorporated body it was held that, as the vehicle belonged to all the members, use by an individual member was not a hiring for reward. That is the case of the members' club. In the other case it was held that there had been a hiring for reward. That is the present case, the case of the incorporated club.

Blanco White K.C. in reply. It is admitted that agency or a trust must be established. That is found in the identity of the membership of the appellant society and the club.

MONKWEARMOUTH CONSERVATIVE CLUB, LIMITED v. SMITH.

The facts of this case were practically identical with those of the preceding case except that the appellant body was a company limited by guarantee under the Companies Acts, and the arguments were on the same lines.

John Charlesworth for the appellant company.

Hylton-Foster (for *W. A. Macfarlane* on war service) for the respondent.

Cur. adv. vult.

1940. Feb. 9. LORD HEWART C.J. read the following judgment of the Court (LORD HEWART C.J., HUMPHREYS and HILBERY JJ.). I will deal first with the case of *Trebanog Working Men's Club and Institute, Ld.* v. *Macdonald*. This is a case stated by a learned stipendiary magistrate, who convicted the appellant society on an information charging it with having on December 10, 1938, unlawfully sold by retail certain intoxicating liquor without holding a justices' licence, contrary to s. 65 of the Licensing (Consolidation) Act, 1910. The information was laid by the local superintendent of police. The premises on which the alleged sale took place

(1) [1937] 1 K. B. 380.

are used as a genuine working men's club, and have been so used since April, 1922. The appellant society is registered under the Industrial and Provident Societies Acts and the sole object of the society, as appears from r. 1 of the rules, which are the rules of the club and of the society, is to "carry on the business of club proprietors, by providing for "the use of its members, and for such associates . . . . as "are admitted to honorary membership, the means of social "intercourse, mutual helpfulness, mental and moral improvement, rational recreation, and the other advantages of a "club." The membership of the society is identical with the membership of the club. The club was also registered in accordance with the requirements of s. 91 of the Licensing (Consolidation) Act, 1910. The other rules of the club show that it is in all respects a members' club.

The case states that intoxicating liquors are purchased in the name of the appellant society on the authority of the committee referred to in r. 17, sub-r. 5. What is in fact provided by r. 17 is as follows. By sub-r. 1: "The "committee shall control the management of the club . . . . "It shall have power to purchase such articles and do all "such things as it may deem necessary for the carrying out "of the objects of the club . . . . The committee shall "not enter into any bond or agreement binding the club to "purchase excisables from any person or persons, or in any "way to part with its absolute control and that of the club "members over the supply of excisable articles to the club." The last provision is taken from s. 95, sub-s. 1 (*h*), of the Licensing (Consolidation) Act, 1910. Failure to comply with this rule would render the club liable to be struck off the register.

Rule 17, sub-r. 5, merely provides that the committee, or any officer authorized by them, shall have power to give orders for such goods to be supplied and work to be done as may be necessary for carrying out the purposes of the club. It would seem, therefore, that it would be more accurate to say that any purchase of excisable articles for the use of this club was made by the committee on behalf of the members of the club, the committee for that purpose making use of the existence of the appellant society to obtain for the club whatever may be the benefits of registration under the Industrial and Provident Societies Acts. Rule 22 of the club rules makes it clear that any profit accruing to the club from the disposal of articles so bought can be used only in the general interest of the members. The question raised by the case is whether, in distributing to the members as against cash payments the excisable articles so provided, there was a sale of intoxicating liquor by retail requiring a licence.

The first general Act dealing with unlawful sales by retail of intoxicating liquor without a justices' licence was the Licensing Act, 1872, which in s. 3 created the offence now contained in s. 65 of the Licensing (Consolidation) Act, 1910, in almost identical terms. Ever since that date it has been a matter of general agreement that the transaction which takes place in a members' club, in which the property in the liquor is in all the members equally, when a member orders and pays for intoxicating liquor, is not a sale at all in the sense in which that word is used in s. 3, but is rather to be deemed the transfer of a special property in the goods from all the other members of the club to the consumer in consideration of the price paid. That aspect of the matter is fully explained in the judgments of Field J. and Huddleston B. in *Graff* v. *Evans*. (1) The club in that case was a bona fide members' club, but by r. 7 of the club rules "all property acquired by the club shall be vested "in the trustees"—no doubt, as Field J. observed in his judgment (2), for the purpose of enabling them to sue or take other legal proceedings with respect to injuries to the possession of the goods belonging to the club. Field J., in holding that no sale by retail of intoxicating liquor took place when a member ordered and paid for a drink, put the matter in this way (3): "I think the true construction of the rules "is that the members were the joint owners of the general "property in all the goods of the club, and that the trustees

(1) 8 Q. B. D. 373.
(2) Ibid. 377.
(3) Ibid. 378.

"were their agents with respect to the general property in the "goods." Huddleston B. in concurring, says (1): "It seems "to me clear that [the member] had a property or at least "an interest in the goods which were transferred to him." The correctness of that decision has never, so far as we are aware, been doubted.

Channell J. in *National Sporting Club* v. *Cope* (2) said that the settled principle that for a purely members' club no licence is required is not defeated by the fact that the property is vested for the purposes of convenience in trustees, although the result of such vesting is, as the learned judge pointed out, that the members of the club have no legal property in the excisable articles. They retain, however, an interest in them, and the obtaining and paying for liquor by the members is treated as a mere distribution of property in which they have a common interest.

In our opinion, the decision in *Graff* v. *Evans* (1) applies to and governs the present case. Once it is conceded that a members' club does not necessarily require a licence to serve its members with intoxicating liquor, because the legal property in the liquor is not in the members themselves, it is difficult to draw any legal distinction between the various legal entities that may be entrusted with the duty of holding the property on behalf of the members, be it an individual, or a body of trustees, or a company formed for the purpose, so long as the real interest in the liquors remains, as in this case it clearly does, in the members of the club. There is no magic in this connection in the expressions "trustee" or "agent." What is essential is that the holding of the property by the agent or trustee must be a holding for and on behalf of, and not a holding antagonistic to, the members of the club. We are dealing here with a quasi-criminal case, where the Court seeks to deal with the substance of a transaction rather than the legal form in which it may be clothed.

The precise question raised in this case was decided by a Divisional Court in *Newell* v. *Hemingway*. (3) The facts were not distinguishable from those in the present case, except that there the company was formed under the provisions of the Companies Acts, and that the person who had been convicted, one Newell, was the manager of the club, and in any event was not the person who should have been prosecuted. The Court consisted of Coleridge C.J. and Manisty J. After a full argument, Lord Coleridge C.J. held that there had been no transaction in the nature of a sale by any one. He considered the case covered by the decision in *Graff* v. *Evans* (1), with which he entirely agreed, adding that he would have arrived at the same result had the matter been res integra. (2) The Chief Justice further observed (2) that to describe what had taken place in this members' club as a sale requiring a justices' licence would be to go far beyond what the Act of Parliament was ever intended to do and to put down practices which the Act was never in the slightest degree aimed at. Manisty J. gave judgment to the same effect. From 1888, the date of that decision, the law was regarded as settled and has been acted on ever since. During the last fifty years, many hundreds of bona fide members' clubs have become registered under the Companies Acts, or the Industrial and Provident Societies Acts, on the faith of the law as therein declared. So far as we are aware, with regard to none of them has it ever been suggested that they required a justices' licence to cover the serving of intoxicants to members.

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(1) 8 Q. B. D. 373, 379.
(2) 16 Times L. R. 158.
(3) 53 J. P. 324.

Of the other cases to which reference was made, *Bowyer* v. *Percy Supper Club, Ld.* (3) and *National Sporting Club* v. *Cope* (4) emphasize the distinction to be drawn between a sale by a third party for his own benefit, for which a licence is required, and a transaction such as took place in this case. The case of *Wurzel* v. *Houghton Main Home Delivery Service, Ld.* (5), which was much relied on by the respondents, was a case different altogether from the present case. It did not depend on the question whether a transaction was or was not one

(1) 8 Q. B. D. 373.
(2) 53 J. P. 326.
(3) [1893] 2 Q. B. 154.
(4) 16 Times L. R. 158.
(5) [1937] 1 K. B. 380.

of sale. The only question there decided was whether a vehicle owned by an incorporated society the members of which consisted exclusively of persons employed at a colliery and which had as its object the business of delivering to its members coal supplied to them from the colliery was a vehicle used for the carriage of goods for hire or reward when it delivered coals to a member and was paid for delivering them. All that was there decided was that, as the incorporated society was a legal entity and was using the vehicle for the carriage of goods and was receiving a reward for the hire, the incorporated society was offending against the words of s. 2, sub-s. 4, of the Road and Rail Traffic Act, 1933. Of the members of the Court in that case, only Swift J. made any reference (1) to *Newell* v. *Hemingway* (2) which expressed any doubt as to the correctness of that decision.

Since 1902 the attention of Parliament has been frequently directed to the question of regulating the distribution of intoxicating liquor in clubs. The Licensing (Consolidation) Act, 1910, itself contains an elaborate code in ss. 91 to 98 in relation to the registration as distinct from the licensing of clubs, and it is significant to find that this general consolidating Act, in repealing s. 3 of the act of 1872, by s. 112 and Sch. VII., has re-enacted it without any material alteration. Even if the Court were to take the view that the decision in *Newell* v. *Hemingway* (2) stood on a less sure foundation than in our opinion it does, it would not follow that we should be entitled to regard the matter as res integra. We agree with the views expressed by Lord Reading C.J. in *Young* v. *Gentle* (3) when he says: "I desire to call attention further to "section 1, sub-section 1, of the Licensing Act, 1902, because, "to my mind, it has a bearing upon the case we are now "considering. I refer to the Act of 1902 for the reason that, "as expressed by James L.J. in *Ex parte Campbell* (4): " 'When (*sic*) once certain words in an Act of Parliament " 'have received a judicial construction in one of the superior " 'Courts, and the Legislature has repeated them without

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(1) [1937] 1 K. B. 380, 394.
(2) 53 J. P. 324.
(3) [1915] 2 K. B. 661, 668.
(4) (1870) L. R. 5 Ch. 703, 706.

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" 'any alteration in a subsequent statute, I conceive that " 'the Legislature must be taken to have used them according " 'to the meaning which a Court of competent jurisdiction " 'has given to them.' Now in 1902 the Legislature repeated "the words which are to be found in section 12 of the Licensing "Act, 1872; some words were added, but the material words "are repeated almost ipsissima verba. Therefore, after the "decisions in *Lester* v. *Torrens* (1) and *Reg.* v. *Pelly* (2), the "Legislature deliberately used the same language which had "received an interpretation not only of a Court of competent "jurisdiction, but of a Court of co-ordinate jurisdiction with "this Court, and in my view we are not entitled at this date "to consider the question as if it were res integra. We must "decide it in accordance with the decisions of Courts of "co-ordinate jurisdiction, which have already dealt with it."

This appeal is accordingly allowed with costs, and the conviction quashed.

I will pass now to the other case, *Monkwearmouth Conservative Club, Ld.* v. *Smith.* In this case the appellant company is a company limited by guarantee, which has for the last fifty years carried on the business of a club in Sunderland. It was agreed between counsel that the facts in this case are not to be otherwise distinguished from those in the last case, and our decision must be the same. The conviction is therefore quashed, and the appeal allowed with costs.

Appeals allowed.

Solicitors for first named appellants: *Wrentmore & Son, for E. T. Davies & Son, Pontyclun.*

Solicitors for first named respondent: *Torr & Co., for A. Clifford Walter, Cardiff.*

Solicitors for second named appellants: *Vizard, Oldham, Crowder & Cash, for W. Bell & Sons, Sunderland.*

Solicitors for second named respondent: *Maude & Tunnicliffe, for Morton & Morton, Sunderland.*

(1) (1877) 2 Q. B. D. 403.

(2) [1897] 2 Q. B. 33.

W. L. L. B.

1939
Dec. 12, 13, 15, 21.

DORMER AND OTHERS *v.* NEWCASTLE-UPON-TYNE CORPORATION.

Local authority—Street barrier—Statutory power to erect posts and rails—Interference with private rights—Nuisance—Newcastle-upon-Tyne Improvement Act, 1865 (28 & 29 *Vict. c. ccl.*), *ss.* 22, 65.

By a private Act the defendants were authorized (s. 22) "to "place and maintain in any street any posts . . . . rails . . . . "or other fence, permanent or temporary, for the protection of "passengers and traffic, and for preserving any footway clear "from annoyance"; and (s. 65) "Provided always, that nothing "in this Act shall authorize the corporation . . . . to do or be "party to any act or thing amounting to a nuisance."

The plaintiffs were the owners of a block of offices and shops in a busy street in Newcastle. Between August and December, 1938, the defendants in exercise of the above powers set up a barrier along the edge of the pavement in front of the plaintiffs' premises to prevent persons from crossing the road at that point. The plaintiffs complained that this constituted a nuisance in that their premises were rendered less fit for use and occupation, and they brought this action for an order for the removal of the barrier and for damages:—

Held, that, while the defendants had exercised their powers reasonably under s. 22, they must exercise them in such a way as not to invade private rights of property contrary to s. 65, and, as they had not done so, that the plaintiffs were entitled to the relief asked.

ACTION before Wrottesley J.

The plaintiffs were the owners of, and other persons with equitable interests in, a block of offices and shops on the north side of Blackett Street, Newcastle, known as Grainger House, of which a substantial part had a frontage to the street, which was a public highway and a busy traffic centre in the city. Just opposite Grainger House two other streets converged and joined Blackett Street. The defendants were the Newcastle-upon-Tyne Corporation.

On August 16, 1938, the defendants, by their engineers, erected a temporary barrier, consisting of ropes and iron posts, along the edge of the pavement in front of Grainger House. After this had remained in position for a considerable time, the barrier was lengthened to the eastward so as to extend not merely along the whole front of Grainger House, but also in front of two shops lying to the east of Grainger House. The result of this was to provide a barrier extending from a pedestrian crossing in Blackett Street for a distance of about 138 feet, and terminating at the western end of Grainger House. The object was to provide that persons walking on the pavement on the north side of Blackett Street should either use the crossing or, if they passed that crossing, should be prevented from crossing the road until they had reached a point beyond Grainger House, where a further crossing was provided. Corresponding restrictions were thus placed on movement in the opposite direction. This happened some time before December 2, 1938, when the rope barrier was taken away, and replaced by a permanent barrier, consisting of posts and two lines of rails.

The plaintiffs alleged that they had suffered damage in consequence, that Grainger House was rendered less fit for use and occupation, particularly for trading purposes, that they had for a time been unable to let their shop and basement, and were now compelled to let them on less favourable terms. They claimed damages for loss of rent, and a declaration that the defendants had no right to erect the guard rails so as to interfere with their private right of free access to the street, or with their public right to cross the pavement in front of their premises. They also claimed a mandatory order and an injunction.

By their defence the defendants admitted the erection of the ropes, posts, and guard rails. They denied that they interfered with the private or public rights of the plaintiffs or that they constituted a nuisance, and they relied on their statutory powers aforesaid. The defendants further pleaded that, if the plaintiffs had suffered damage by reason of the guard rails, it had been caused in the execution by the defendants of their statutory duty, and that the plaintiffs had no cause of action.

Sydney Turner K.C. and *Havers K.C.* for the plaintiffs. The erection of this barrier is an invasion of the plaintiffs' private rights of access from their premises to the highway

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which is not countenanced by the statute, and is a good ground of action: *Rose* v. *Groves* (1), *Lyon* v. *Fishmongers' Co.* (2) The power granted to the corporation under s. 22 of the Act of 1865 is qualified by s. 65 of that Act. (3) The owner of land adjoining a highway has a right of access to any part of the highway unless some statute has deprived him of it: *Marshall* v. *Blackpool Corporation.* (4) The statute here does not purport to do that. On the contrary, it preserves to owners their private rights. There is no provision in the statute for payment of compensation and the presumption is that the Legislature intended that the erection of posts and rails should be done, if at all, "without injury to others": *Metropolitan Asylum District* v. *Hill* (5), per Lord Blackburn, and *Edgington* v. *Swindon Corporation.* (6) Apart from being unlawful, the acts of the defendants here were done without regard to the plaintiffs' interests and rights, and they have used their powers unreasonably: *Goldberg & Son, Ld.* v. *Liverpool Corporation.* (7) [They referred to Craies on Statute Law, 6th ed., pp. 148–150.]

R. M. Montgomery K.C. and *A. Capewell* for the defendants. The statute here contemplates an interference with private rights by the corporation, and the powers conferred on them are granted to protect them from legal proceedings which might otherwise be brought. It must be assumed that the defendants have exercised their powers reasonably in discharge of their functions. It cannot be supposed that

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(1) (1843) 5 Man. & G. 613.

(2) (1876) 1 App. Cas. 662.

(3) By the Newcastle-upon-Tyne Improvement Act, 1865 (28 & 29 Vict. c. ccl.), s. 22, the defendants were authorized to "place and "maintain in any street any posts, "pillars, rails, bars, chains, or "other fence, permanent or tem-"porary, for the protection of "passengers and traffic, and for "preserving any footways clear "from annoyance, and for preven-"tion of accidents, and may place "posts in the carriage-way of any "street so as to make the crossing "thereof less dangerous to pas-"sengers . . . ."

Sect. 65: "Provided always, "that nothing in this Act shall "authorize the corporation or any "lessee of the corporation to do "or be party to any act or thing "amounting to a nuisance."

(4) [1935] A. C. 16.

(5) (1881) 6 App. Cas. 193, 203.

(6) [1939] 1 K. B. 86.

(7) (1900) 82 L. T. 362, 366.

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the Legislature would give with one hand and take away with the other: *Camberwell Assessment Committee* v. *Ellis.* (1) The true effect of s. 65 is that the corporation must not abuse their powers. In *Goldberg & Son, Ld.* v. *Liverpool Corporation* (2) it was held that the nuisance which the corporation had created in the course of making an electrical tramway could not be interfered with unless the plaintiffs could prove that the corporation had abused the powers given them by Parliament. Here the defendants must not, when erecting these posts, cause a supplementary or ancillary nuisance to persons in the position of the plaintiffs. The posts must not be in themselves dangerous. But the section protects the corporation if they infringe the rights of others, whether public or private, in exercising their powers bona fide and with judgment and discretion: *London, Brighton and South Coast Ry. Co.* v. *Truman* (3); *East Fremantle Corporation* v. *Annois.* (4) Private owners are thus, in the absence of abuse of the powers, without remedy, except in so far as some special provision is made by statute. Further, s. 65 appears to have no application to s. 22 at all, it being embodied in a different fasciculus of sections, the one (s. 22) dealing with streets, the other (s. 65) with sewers. Assuming, however, that it does apply, the effect is not to cut down the powers of the corporation to do acts which would otherwise constitute a nuisance. Here the defendants have carried out their duties to the best of their ability and in accordance with the statute, and having done so they are protected. The case falls within the principle of *London, Brighton and South Coast Ry. Co.* v. *Truman* (3) and *East Fremantle Corporation* v. *Annois* (4), and not within *Metropolitan Asylum District* v. *Hill* (5), where, as Lord Watson said: "The terms "of the statute" were "not imperative, but permissive," and therefore the inference was that the Legislature intended the discretion of the appellant body to be exercised "in strict "conformity with private rights."

(1) [1900] A. C. 510.
(2) 82 L.T. 362, 366.
(3) (1885) 11 App. Cas. 45.
(4) [1902] A. C. 213.
(5) 6 App. Cas. 193, 213.

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Sydney Turner K.C. in reply. While s. 22 authorizes interference with general rights, s. 65 forbids the creation of a private nuisance, and this is not inconsistent with the defendants' powers under s. 22. Indeed, any other construction renders the two sections conflicting. It is quite possible for the defendants' powers to be exercised without interference with private rights, e.g., in the protection of an exit from school grounds to the highway. As to when a nuisance becomes actionable each case must depend on its own facts, and no general principle can be laid down. The present case is governed by *Metropolitan Asylum District* v. *Hill.* (1) There is no obligation on the defendants to erect these posts, and therefore if a nuisance is caused to the plaintiffs the statute is no defence. The statutory powers here are permissive only, and *London, Brighton and South Coast Ry. Co.* v. *Truman* (2) can be distinguished, because there the railway under the company's Act was to be made and used whether a nuisance was created or not. Where there is no compulsion there must be no interference with private rights. In none of the cases cited by the defendants did the particular statutes contain a section corresponding to s. 65.

Cur. adv. vult.

1939. Dec. 21. WROTTESLEY J. read a judgment, which, after stating the facts, was a follows: The plaintiffs complain that this barrier is a nuisance and seriously invades their rights, and ask that the Court shall order it to be removed and award them damages for the injury which has already been caused to them. There cannot be any doubt that this barrier is a nuisance, nor that it seriously invades the plaintiffs' rights of access as owners of property in a street to the carriageway of the street, and this has not been seriously contested. But the defendants say that Parliament, by the Newcastle-upon-Tyne Improvement Act, 1865, s. 22, authorized them to erect the barrier, and that, therefore, nuisance or no nuisance, they are acting within their powers. There is no doubt that if Parliament has clothed the corporation with

(1) 6 App. Cas. 193.

(2) 11 App. Cas. 45.

such powers, without limitation, the persons whose rights are invaded by the exercise of those powers have no remedy. There are many cases where public bodies have been entrusted by Parliament with powers to be exercised for the benefit of the public, the exercise of which results inevitably in the invasion of persons' rights, yet Parliament has not always in these cases provided that persons so injured shall be compensated. Such powers must always be exercised reasonably, that is to say, in such a manner as to do as little damage as possible to persons affected, but, provided they are so exercised, then the damage done is one for which the Courts provide no remedy.

The Newcastle-upon-Tyne Improvement Act, 1865, contains another section, s. 65, on which the plaintiffs rely as an answer to the defendants' claim to erect this barrier. That section, which is in the form of a proviso, is to be found in a bundle of sections dealing with "Sewers—Sanitary arrangements," and so described in a marginal note, whereas s. 22 is the first of a bundle of sections dealing with streets, and so described. The Act is one obtained by the corporation and it deals with a great variety of matters, including various street works, and, apart from s. 22, the corporation might find themselves involved in activities authorized under the Act which might be a nuisance. While the defendants do not abandon the point, and in fact in terms reserve it, they did not urge in this Court that s. 65 is, either by reason of its language or of its position in the statute, not to be read as a limitation on the corporation's activities under s. 22. Its language is indeed indisputable, namely, that "nothing "in this Act shall authorize . . . . the corporation . . . . to "do any act . . . . amounting to a nuisance." Except by doing violence to that language, I cannot possibly hold that the corporation are in the exercise of s. 22 authorized to erect and maintain these posts and rails regardless of whether they are or are not a nuisance.

The corporation, however, urge that, properly understood, s. 65 does not mean that they cannot erect these posts and rails. On their behalf, Mr. Montgomery points out that

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which cannot be gainsaid, namely, that you cannot put any post or rail or fence in a street without committing the most elementary and well understood form of nuisance. And since that is so, it is said that s. 65 cannot be read in its ordinary meaning, for, if it is so read, Parliament has elaborately enacted something in s. 22 which it has with equal formality gone on to forbid in s. 65. And since this is (to use the phrase of Lord Halsbury L.C. in *Camberwell Assessment Committee* v. *Ellis* (1)) "disrespectful to the Legislature," we are, Mr. Montgomery says, driven to the conclusion that in s. 65, the word "nuisance" has not its ordinary meaning. Accepting this proposition, the corporation offers as the true meaning of the language in s. 65 that it really is only another way of saying what the Courts have said time and again, that in exercising their powers the corporation must not act unreasonably, they must not do more damage to private interests than they need, they must not abuse their powers, they must act bona fide. Mr. Montgomery words his proposition in language rather different from that used in the cases on which he relies, and says that the language of s. 65 is directed to prevent the corporation from creating nuisances other than the one which they are in terms permitted to create. For instance, he says that it is there to ensure that the posts which they erect are not spiked posts, and that a fountain, if constructed, is not so constructed as to be a trap. In other words, the corporation must not, in creating the nuisance they are authorized to create, create also a supplementary or ancillary nuisance.

In support of their case, the corporation rely on the following authorities: *London, Brighton and South Coast Ry. Co.* v. *Truman* (2); *Goldberg & Son, Ld.* v. *Liverpool Corporation* (3); *East Fremantle Corporation* v. *Annois* (4); and *Edgington* v. *Swindon Corporation.* (5) In *London, Brighton and South Coast Ry. Co.* v. *Truman* (2), a railway company which created a nuisance on land purchased by agreement under their Special Act by carrying on a cattle yard in connection with their cattle-carrying business were held to be authorized to do what they did, and, in the absence of negligence, it was held that adjoining owners had no remedy. As Lord Halsbury L.C. said (1): "It cannot now be doubted "that a railway company constituted for the purpose of "carrying passengers, or goods, or cattle, are protected in "the use of the functions with which Parliament has entrusted "them, if the use they make of those functions necessarily "involves the creation of what would otherwise be a nuisance "at common law. Ever since the decision of *Rex* v. *Pease* (2), "in 1832 it has been established so firmly by repeated decisions "that that proposition is no longer within the region of "controversy." Lord Halsbury then went on to deal with the grounds on which it was said the case under discussion could be distinguished, in that the cattle yard was not within the limits of deviation shown in the Act, and was not specifically authorized on the site where it was ultimately erected.

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(1) [1900] A. C. 510, 517.
(2) 11 App. Cas. 45.
(3) 82 L. T. 362.
(4) [1902] A. C. 213.
(5) [1939] 1 K. B. 86.

The distinction between such cases and *Metropolitan Asylum District* v. *Hill* (3) was dealt with by Lord Halsbury in the following passage (4): "The Railway Acts, treated as "a well-known and recognized class of legislation, were "expressly and carefully distinguished from the permissive "character of the legislation which your Lordships were then "construing"—that is to say, in the case of *Metropolitan Asylum District* v. *Hill.* (3) "Broadly stated, the distinction "taken amounted to this, that a small-pox hospital might be "built and maintained if it could be done without creating a "nuisance, whereas the Railway Acts were assumed to "establish the proposition that the railway might be made "and used whether a nuisance were created or not." It is to be noted that those Railway Acts contained no such section as s. 65 in this Act, in terms excluding the power to create a nuisance.

Goldberg & Son, Ld. v. *Liverpool Corporation* (5) was the case of a pole and fuse box erected close to the principal entrance to the plaintiffs' premises by the defendants under their Tramways Act, 1897. It was pointed out by Lindley M.R. that the corporation were given " express power "to do acts which but for that power would be unquestionably "common law nuisances . . . . You cannot interfere with "streets without committing a common law nuisance." The Court was satisfied that the defendants acted bona fide in erecting the pole. That being so, said the Master of the Rolls, " the nuisance has been sanctioned by Act of Parliament, "and unless they can show that the powers of the Act of "Parliament have been so abused that this Court ought to "say to the defendant, ' We will interfere and prevent you "' using your rights,' the plaintiffs have no case. In my "judgment, the plaintiffs fail to make out the essential "proposition which it is necessary for them to sustain in this "case, that there has been such an abuse of the powers of "the defendants that this Court can interfere." Here again it is to be noted that there was not anything equivalent to s. 65 in the Acts on which the defendants relied.

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(1) 11 App. Cas. 45, 50.
(2) (1832) 4 B. & Ad. 30.
(3) 6 App. Cas. 193.
(4) 11 App. Cas. 53.
(5) 82 L. T. 362, 365.

East Fremantle Corporation v. *Annois* (1) was a case where the appellant municipality, in altering the grade of a road or street under an Act empowering them to do so, drove a cutting past the respondent's house, leaving it perched on a bank six or eight feet above the road. The alteration was clearly no more than was necessary for dealing properly with the road. Lord Macnaghten propounded the law on this topic as follows: " The law has been settled for the last hundred "years. If persons in the position of the appellants, acting "in the execution of a public trust and for the public benefit, "do an act which they are authorized by law to do, and do "it in a proper manner, though the act so done works a "special injury to a particular individual, the individual "injured cannot maintain an action. He is without remedy "unless a remedy is provided by the statute. That was "distinctly laid down by Lord Kenyon and Buller J., and "their view was approved by Abbott C.J. and the Court of

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(1) [1902] A. C. 213.

"King's Bench. At the same time Abbott C.J. observed "that if in doing the act authorized the trustees acted "arbitrarily, carelessly, or oppressively, the law in his opinion "had provided a remedy. Those words, 'arbitrarily, care-"'lessly, or oppressively,' were taken from the judgment of "Gibbs C.J. in *Sutton* v. *Clarke* (1), decided in 1815. As applied "to the circumstances of a particular case, they probably "create no difficulty. When they are used generally and at large, "it is not perhaps very easy to form a conception of their "precise scope and exact meaning. In simpler language "Turner L.J. observed in a somewhat similar case that 'such "'powers are at all times to be exercised bona fide and with "'judgment and discretion.' And in a recent case (2), where "persons acting in the execution of a public trust were sued "in respect of an injury likely to result from their act, the "present Master of the Rolls, then Collins L.J., observed that "'the only obligation on the defendants was to use reasonable "'care to do no unnecessary damage to the plaintiffs.' "(3) Here again there was no section to the same effect as s. 65 in this case.

Finally, in *Edgington* v. *Swindon Corporation* (4), the facts are somewhat similar to those in this case. A local Act empowered the local authority to erect shelters, and a shelter was erected so as to interfere with the rights of frontagers. Finlay L.J. summed up both the authorities and his view of the case before him thus: "I, therefore, cannot "resist the conclusion that the true view here is that Parliament "has thought fit to authorize the defendants to do a thing "which at the least might, and I would go further and say "almost certainly would, interfere with the rights of the "owners of private property. If that is so, it seems to me "that the case is at an end. One cannot go into questions "of degree. The interference may be very slight, or it may "be more serious. These matters are for the consideration

(1) (1815) 6 Taunt. 29, 34; 16 R. R. 563.

(2) *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works* [1898] 2 Ch. 603, 613.

(3) [1902] A. C. 213, 217, 218.

(4) [1939] 1 K. B. 86, 92.

"of the defendants subject, of course, to the very important "fact that the Court would intervene if they acted unreasonably—and I should think they would act unreasonably if, "having a choice of equally available sites, they chose to "put their shelter on a site which would do really serious "damage to adjacent property."

None of these cases, therefore, had to deal with the interpretation of an Act which undoubtedly authorized a nuisance in terms, a common law nuisance, and then went on to say that nothing contained in the Act was to authorize the corporation to do or be a party to any act or thing amounting to a nuisance.

For the plaintiffs, Mr. Turner offers a different explanation affording, as he says, both to s. 22 and also to s. 65 of the Act a perfectly reasonable meaning. It is that under s. 22 the corporation is empowered to erect fences or barriers which would undoubtedly be a public nuisance, but by s. 65 they are forbidden so to erect this barrier as to be a private nuisance, that is to say, so as to cause some special damage to some person over and above that inflicted on the community at large, or so as to injure a person's property, including any easements to which he may be entitled in respect of that property.

It has been said so often that I need not quote authority for it, that the burden of proving that Parliament has authorized the doing of acts which interfere with private rights rests on those who claim the right to do those acts and that statutes of this kind must be construed strictly against the parties to whom the authority is given. More particularly is this the case when the statute relied on contains no provision for compensation for those who are injured.

If, therefore, the only meaning to be given to s. 65 is that the corporation are not, so to speak, to pile unnecessary nuisances on to necessary nuisances, this section really enacted nothing that had not already been the law of this country long before 1865. The sparks cases before the Railway Fires Act, 1905, are, of course, only one type of instance of the application of this principle to railway legislation, and, even as far back as 1830, in construing a railway Act in *Coats* v. *Clarence Ry. Co.* (1), Lord Lyndhurst L.C. held that the Court ought to interfere to protect the plaintiff in these circumstances. The railway company had power to construct their railway across a mill race and were proposing so to construct that particular arch or bridge as to interfere with the working of the mill. It was clear from the evidence that it was possible for the railway so to construct their arch as not to interfere with the mill race. In those circumstances the Lord Chancellor was of opinion that the Court ought to interfere to protect the plaintiff and he awarded an injunction by which the company were restrained from making over the mill race any arch of less dimensions than the arch recommended by the engineer's report. It is perfectly true that in the Act authorizing that railway are to be found words with which we are all familiar—namely, the words that in making their works the company should do as little damage as might be in the execution of the powers conferred on them and that they should make full satisfaction for all the damage sustained by reason of the execution of such powers. We are all familiar with those words appearing in that type of Act, but that is the principle which has always governed the Courts in controlling persons who are granted by Parliament the right to interfere with private rights, whether those words are in the Act of Parliament or not.

On the other hand, it was certainly not impossible in 1865, and it is not now impossible, to place in streets posts and barriers which are (if I may use that phrase) a technical nuisance and yet do not invade the rights of frontagers, or constitute what is called an actionable nuisance. All of us are familiar with such barriers; for instance, those which prevent wheeled traffic from invading passages which are either too narrow or too steep to admit vehicles without danger to the vehicles or foot passengers or both. Another is the case of railings set up in front of the exit from a school, railings which so far from damaging enhance the value of the school premises for the purpose for which they are used.

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(1) (1830) 1 Russ. & My. 181.

Technical nuisances of this kind generally improve instead of reduce the value of the premises fronting on the passages which are by posts made safe from vehicular invasion.

Here then is an interpretation which gives both scope and meaning to s. 65, whether it be applied to sewage disposal works or posts in streets. Without that section I should have no doubt that this was a case where Parliament had decided in the public interest to subject individuals to having their rights of property invaded without remedy or compensation. Indeed the case would be covered by the decision of Finlay L.J. in *Edgington* v. *Swindon Corporation.* (1) With that section I think that Parliament meant the power so to be exercised as not to invade private rights of property at all. In this respect, therefore, the corporation must submit to a limitation on their powers in the same manner as other important bodies, such as electricity and gas undertakers throughout the country.

[His Lordship then held that the barrier was not an unreasonable exercise of the powers of the corporation under the Act. He assessed the damages payable to the plaintiffs at 1500*l.*, gave judgment for the plaintiffs for that amount, and made a mandatory order for the removal of the guard rails.]

Judgment for plaintiffs.

Solicitors for the plaintiffs: *Dawson & Co.*

Solicitors for the defendants: *Collyer-Bristow & Co., for Town Clerk, Newcastle-upon-Tyne.*

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(1) [1939] 1 K. B. 86.

F. P. F.

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1940
Jan. 29, 30;
Feb. 23.

Revenue—Estate duty—Gift inter vivos—Shares in company—Subsequent issue of bonus shares—Death of donor less than three years after gift—Duty not payable on value of bonus shares—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2, *sub-s.* 1 (*c*)*;* 22, *sub-s.* 1 (*f*).

In January, 1934, T. gave to his daughter, the defendant, 25,000 ordinary shares of 1*l.* each in a company. In May, 1935, the company resolved to increase its capital by the issue to the ordinary shareholders of bonus shares, fully-paid out of the company's general reserve, in the proportion of two bonus shares for every five existing shares; 10,000 bonus shares were accordingly allotted to the defendant. In April, 1936, T. died, and the Crown claimed estate duty on the value of the 10,000 bonus shares as well as on the 25,000 original shares (on which it was admittedly chargeable):—

Held, that the bonus shares were not property passing under the disposition made by T. and, therefore, estate duty was not chargeable on their value.

English Information tried before Wrottesley J.

By his information the Attorney-General sought to recover estate duty claimed on the death of George Booth Tate, in respect of certain shares as property comprised in a voluntary disposition made by him less than three years before his death. All the facts alleged in the information were admitted by the defendant, Mrs. Jane Marjorie Oldham, a daughter of Mr. Tate, but she submitted that duty was not payable on the value of the bonus shares hereinafter mentioned.

On January 26, 1934, Mr. Tate transferred to the defendant by way of gift, 25,000 ordinary shares of 1*l.* each in Tate and Lyle, Ld. ("the company"). At that date the company's capital was 4,500,000*l.*, divided into 3,400,000 ordinary shares of 1*l.* each and 1,100,000 6½ per cent. preference shares of 1*l.* each, all of which had been issued. In the 1933 balance sheet the general reserve amounted to 1,500,000*l.*, and in the 1934 balance sheet that figure was increased to 1,650,000*l.* On May 9, 1935, the company in general meeting resolved that the capital of the company be increased to 6,200,000*l.* by the creation of 1,700,000 new ordinary shares of 1*l.* each, that 1,360,000*l.* of the general reserve be capitalized and applied in paying up 1,360,000 of the new shares, and that those shares be distributed among the holders of the ordinary shares in the proportion of two such shares for every five shares held. Pursuant to those resolutions the company allotted 10,000 ordinary shares of 1*l.* each, credited as fully paid, to the defendant. Mr. Tate died on April 30, 1936, less than three years after the transfer of the original 25,000 shares to the defendant.

The Stock Exchange prices of the ordinary shares were quoted in the Official List on the material dates as follows :—

Jan. 26, 1934	$4\frac{1}{16}$–$4\frac{3}{16}$
May 8, 1935	$5\frac{7}{16}$–$5\frac{9}{16}$
May 10, 1935	$3\frac{13}{16}$–$3\frac{15}{16}$
April 30, 1936	$4\frac{13}{32}$–$4\frac{15}{32}$

The Commissioners of Inland Revenue claimed that estate duty became payable at the appropriate rate under s. 38, sub-s. 2, of the Customs and Inland Revenue Act, 1881 (as amended by s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889, and s. 59, sub-s. 1, of the Finance (1909–10) Act, 1910), and s. 2, sub-s. 1 (*c*), of the Finance Act, 1894 (1), in

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(1) By s. 38, sub-s. 2, of the Customs and Inland Revenue Act, 1881, as amended (so far as material) by s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889, and s. 59, sub-s. 1, of the Finance (1909–10) Act, 1910 : "The personal or moveable "property to be included in an "account shall be property of the "following descriptions, viz. :— "(*a*) Any property . . . . taken "under a voluntary disposition "made by any person . . . . purporting to operate as an immediate gift inter vivos whether "by way of transfer, delivery, "declaration of trust or otherwise, "which shall not have been bonâ "fide made three years before the "death of the deceased."

By s. 1 of the Finance Act, 1894 : "In the case of every "person dying after the commencement of this Part of this "Act, there shall, save as hereinafter expressly provided, be "levied and paid, upon the "principal value ascertained as "herein-after provided of all "property, real or personal, "settled or not settled, which "passes on the death of such "person a duty called 'Estate "'duty' . . . ."

Sect. 2, sub-s. 1 : "Property "passing on the death of the "deceased shall be deemed to "include the property following, "that is to say :— . . . (*c*) Property "which would be required on the "death of the deceased to be "included in an account under "s. 38 of the Customs and "Inland Revenue Act, 1881, as "amended by s. 11 of the

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respect alike of the 25,000 original shares and of the 10,000 bonus shares allotted to the defendant. The defendant admitted that duty was payable in respect of the original 25,000 shares, but she denied that it was payable in respect of the bonus shares. The informant asked for a declaration that duty was payable on the whole 35,000 shares and for an account and payment thereof.

Sir Donald Somervell A.-G. (*J. H. Stamp* with him) for the Crown. The Attorney-General is entitled to the declaration claimed. The substance, not the form, of the gift must be looked at. If, unfettered by the form of the gift, one finds at the date of death of the donor substantial identity with the original gift with only such changes as flow, broadly speaking, from its own nature, e.g., an alteration in the value of shares or a splitting up of shares—one takes the gift in its altered form, with such accretion or diminution in value as may have occurred, as the value at the date of death. In *Attorney-General* v. *Montagu* (*Lord*) (1), the House of Lords based their decision on an analysis of the substance of the transaction, and in *Lethbridge* v. *Attorney-General* (2), Lord Atkinson said: "It has many times been decided that in "dealing with questions arising on the Finance Act of 1894 "and the Succession Duty Acts regard should be had to the "substance of the transactions on which these questions turn "rather than to the forms of conveyancing which the parties to "them may have adopted to carry out their objects." This principle has been adopted many times in estate duty cases. Looking at the substance of the matter one finds in the present case that the bonus shares have a substantial identity with the original shares which were the subject-matter of the gift.

"Customs and Inland Revenue "Act, 1889, if those sections were "herein enacted and extended to "real property as well as personal "property, and the words 'volun- "'tary' and 'voluntarily' and "a reference to a 'volunteer' "were omitted therefrom."

By s. 22, sub-s. 1 (*f*): "The "expression 'property' includes "real and personal property and "the proceeds of sale thereof "respectively and any money or "investment for the time being "representing the proceeds of "sale."

(1) [1904] A. C. 316.

(2) [1907] A. C. 19, 26.

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[He also referred to *Strathcona* (*Lord*) v. *Inland Revenue.* (1)]

R. F. Roxburgh K.C. and *F. Heyworth Talbot* for the defendant. The Court has to look, not for the value of the gift apart from the disposition, but for the principal value of the property taken under the disposition: see s. 1 of the Finance Act, 1894. The transfer of the shares, and nothing else, was the disposition here, and a transfer differs fundamentally from a settlement. In *In re Payne's Declaration* (2), Simonds J. was dealing, not with a transfer of shares, but with a settlement, and it is submitted that he would not have decided the case on the ground he did if he had not been impressed with the distinction between a settlement and a transfer. Here there was a disposition which transferred to the donee certain shares which were and still are capable of identification, merely by looking at their denoting numbers. The transferee, on being registered as owner of the shares, thereby acquired certain rights. What the Court has to do here is merely to ascertain the market price of the shares taken under this disposition. The Crown must say that dividends as well as bonus shares are "property" within the section, or fail, for there is no distinction between profits distributed in the form of dividends and profits distributed in the form of bonus shares. In each case they are profits made available to the shareholder because he is a shareholder, and not something which he takes under the disposition by which he obtained his shares. The Crown cannot go behind a transaction which is a genuine and not a colourable transaction, merely because it has had the effect of reducing the subject's liability to tax: *Inland Revenue Commissioners* v. *Westminster* (*Duke*). (3) The argument for the Crown amounts to saying that the shares transferred plus the bonus shares are in substance the same thing as the shares originally transferred. That is contrary both to principle and authority. As long as the original shares retain their identity they can never be the same as themselves plus something else. They referred to *Strathcona* (*Lord*) v. *Inland Revenue* (1), to the judgment of

(1) 1929 S. C. 800.

(2) [1939] Ch. 865.

(3) [1936] A. C. 1.

Rowlatt J. in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (1), where he said: ". . . . in a taxing Act "one has to look merely at what is clearly said. There is no "room for any intendment. There is no equity about a "tax. There is no presumption as to a tax. Nothing is to "be read in, nothing is to be implied. One can only look "fairly at the language used": and to *In re Kuypers*. (2)

J. H. Stamp in reply. If a shareholder owns five shares out of a total of five hundred issued by a company, he has one-hundredth of the dividends declared, one-hundredth of the voting rights, and one-hundredth of the distributable assets. If the company then increases its capital to seven hundred shares by issuing two additional shares for every five held, the shareholder is in exactly the same position as before, with one-hundredth of the dividends, one-hundredth of the votes and one-hundredth of the assets. His seven shares represent in substance exactly the same rights as he possessed in respect of his original five shares. Therefore, there is here substantial identity between the gift and the shares we seek to charge. Alterations in form which arise out of the inherent nature of property are disregarded in considering the identity of the property at different periods in its history. In the case of a settlement, the settled property retains its identity throughout, whatever the changes of investment, and in the case of an absolute gift, where there is no document to confer such a continuing identity, one is thrown back on the nature of the gift itself. One can only infer the intention of the Finance Act to preserve the identity of the gift from the extraordinary consequences which would follow any other rule. The natural fruits of a gift are part of the gift. If a donor gives a mare which proves to be in foal, the value to be taken is that of mare plus foal. So if the gift were a park with a herd of deer the valuation would be of the herd at the date of death. One could not sort out the three-year olds and value those alone. Anything that the donee spends in connection with the gift, e.g., a call on shares not

(1) [1921] 1 K. B. 64, 71; in C. A. [1921] 2 K. B. 403.
(2) [1925] Ch. 244.

fully paid, he is given credit for, but anything that evolves by its own growth is part of the gift.

Cur. adv. vult.

1940. Feb. 23. WROTTESLEY J. read the following judgment. The defendant's liability must depend on ss. 1, 2 and 22 of the Finance Act, 1894. [His Lordship read the relevant parts of s. 1, and s. 2, sub-s. 1 (*c*), and continued:] This rigmarole means this, so far as this case is concerned: "Any property . . . . taken under a dis-"position made by a person dying after August 1, 1894, "purporting to operate as an immediate gift inter vivos . . . . "which shall not have been bonâ fide made three years before "the death of the deceased." Casting back to s. 1, the property taken under such a disposition is to bear estate duty levied on its principal value, and s. 7, sub-s. 5, provides that the principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased. Finally, "property" is defined by s. 22.

So the question is whether these bonus shares, issued to the defendant by the company, are property taken under the disposition, that is to say, the gift which Mr. Tate made of the ordinary shares, less than three years before his death. There are many and obvious difficulties in answering "Yes" to this question. These shares are property, but they are not gathered in by the definition section, for they are not the proceeds of sale of the ordinary shares, nor an investment for the time being representing the proceeds of sale of the ordinary shares. The case for the Crown depends not on any literal reading of the relevant taxing statutes, but rather on what they suggest is the substance of the transaction. It is put thus. Mr. Tate's gift, the thing he gave, has in part changed its form in a way which arises from its inherent nature. The shares given represented certain rights against the company, namely, to receive a proportion of any profit that was distributed, whether by way of dividend or capital.

There was this large sum of accumulated profit, and all that has happened is that the company chose to distribute this profit to the shareholders in the form of bonus shares. So the 25,000 ordinary shares have now become 35,000 shares and the shareholder is, after that accretion of capital, exactly where she was vis-à-vis the company and the other shareholders. Where she had five shares she now has seven, but, since that happened to every shareholder, they are all as they were. So her father gave the defendant not five shares, as he thought, but seven shares, as we now know, and the values illustrated by the Stock Exchange prices before and after the distribution, show clearly that that is so.

The debate has wandered over a wide area. The Attorney-General and Mr. Stamp have put before me cases tending to show that a literal construction will not do. For instance, if shares are divided up, it is said, one share becoming two, there is no difficulty in identifying the two shares with the one which gave rise to them. Nor is there. Then comes the mare, believed to be in foal when given, or the cow in calf, the pedigree herd of cattle, the herd of deer, which I think Mr. Stamp must mean to be in a park. Wild deer would hardly be an appropriate illustration. In another category is the block of shares settled on trustees. Here, I think, different considerations come into play, for the law will, as it were, isolate and identify the subject-matter of a trust, even if the definition section of the Act of 1894 were not there to enable the Crown to follow the thing given into the proceeds of sale and beyond it into the investment of those proceeds. Illustrations of this kind are interesting and instructive as showing how the abstract rule can be applied easily, or with difficulty, to concrete cases. Some of them present real difficulties. The line of approach is seductive. If you can depart from the literal where a share loses its identity by being split, why stop there? But neither the practice of the Crown in dealing with these cases, nor the concessions which it is said the Crown makes in some of these cases, really throws any light on what the words of the statutes mean, provided those words are reasonably clear.

I am invited to have regard to the substance of the transaction, that is to say, the company's act in distributing their reserves in the form of bonus shares. *Lethbridge* v. *Attorney-General* (1) is relied on, and especially what was said by Lord Atkinson: "It has many times been decided "that in dealing with questions arising on the Finance Act "of 1894 and the Succession Duty Acts regard should be "had to the substance of the transactions on which these "questions turn rather than to the forms of conveyancing "which the parties to them may have adopted to carry out "their objects." If what is contended for is that the Court must not close its eyes to what a transaction really provides, should that be different from what the form of the transaction appears to provide, there is no doubt that that is the duty of the Court, and that is what was in question in *Attorney-General* v. *Montagu* (*Lord*). (2) But in this case I have to deal with a transaction the bona fides and true meaning of which are not challenged or in doubt. It is no more wrong or malâ fide that a man should give what he no longer needs, or is prepared to part with, to his children before he dies, than that he should keep it until he dies and then leave it to them. The fact is that we are not in this case in a region where right or wrong, or good or bad faith, obtains. Here the company decided to distribute the reserves as capital, for reasons which were, I suppose, satisfactory to the shareholders. They had nothing whatever to do with this case.

The " substance " to which I am invited to have regard is a different kind of substance. In effect I am invited to fill in the gaps in the Act of 1894, and the only reason suggested why I should take on my shoulders this burden, which is really legislation rather than construction, is that unless I do so a subject will go to some extent untaxed in respect of a monetary advantage which came to her by reason of a gift from her father, which is itself subject to tax. It is, of course, desirable that all subjects in the like case should suffer the same tax, but before I fill in such a gap I must remember what Rowlatt J. said in *Cape Brandy Syndicate* v. *Commissioners of Inland Revenue* (1): "It is urged by Sir William Finlay "that in a taxing Act clear words are necessary in order to "tax the subject. Too wide and fanciful a construction "is often sought to be given to that maxim, which does not "mean that words are to be unduly restricted against the "Crown, or that there is to be any discrimination against the "Crown in those Acts. It simply means that in a taxing "Act one has to look merely at what is clearly said. There is "no room for any intendment. There is no equity about a "tax. There is no presumption as to a tax. Nothing is to "be read in, nothing is to be implied. One can only look "fairly at the language used." I must also bear in mind what Lord Tomlin said in *Inland Revenue Commissioners* v. *Westminster* (*Duke*) (2): "Apart, however, from the question "of contract with which I have dealt it is said that in revenue "cases there is a doctrine that the Court may ignore the "legal position and regard what is called 'the substance of "'the matter' and that here the substance of the matter is "that the annuitant was serving the Duke for something "equal to his former salary or wages, and that therefore, "while he is so serving, the annuity must be treated as salary "or wages. This supposed doctrine (upon which the "Commissioners apparently acted) seems to rest for its support "upon a misunderstanding of language used in some earlier "cases. The sooner this misunderstanding is dispelled and "the supposed doctrine given its quietus the better it will "be for all concerned, for the doctrine seems to involve "substituting 'the incertain and crooked cord of discretion' "for 'the golden and streight metwand of the law.' (3) "Every man is entitled if he can to order his affairs so that "the tax attaching under the appropriate Acts is less than it "otherwise would be. If he succeeds in ordering them so "as to secure this result, then, however unappreciative the "Commissioners of Inland Revenue or his fellow tax-payers "may be of his ingenuity, he cannot be compelled to pay an

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(1) [1907] A. C. 19, 26.

(2) [1904] A. C. 316.

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(1) [1921] 1 K. B. 64, 71.

(2) [1936] A. C. 1, 19.

(3) 4 Inst. 41.

"increased tax. This so-called doctrine of 'the substance' "seems to me to be nothing more than an attempt to make a "man pay notwithstanding that he has so ordered his affairs "that the amount of tax sought from him is not legally "claimable." If, then, I need it, I have excellent authority for not accepting the invitation, however tempting, to theorize as to what Parliament must have intended to include in the phrase "property taken under a disposition" other than what it said. In plain English it means "given to" a person. If it can be said that the defendant was given these bonus shares by her father, then equally can it be said that she was given every dividend that has accrued to her in respect of the ordinary shares. This appears to me not to be common sense. If the defendant were asked whether her father had given her those dividends, it would be an abuse of language for her to say "Yes."

Another line of approach, though really leading to the same goal, is that through the cases on the method of valuation intended by the Act. Here again the problem posed by the Act is by no means always easy to solve. If you must treat something which a man gave early in 1934 as though he did not in fact do so, but kept it until he died in 1936 and then bequeathed it by will, you may easily find yourself in difficulties if you try to value it at the later date and tax the donee on the later value. In *Strathcona (Lord)* v. *Inland Revenue* (1), the court of session had to consider how this valuation should be done, and the judgments in that case show how differently the problem may be approached and solved by different minds. I do not think that I can derive any assistance in the present case from any of the judgments there. The decision, anyhow of the majority, was that the valuation was to be made at the date of the donor's death, and that in the case of shares it would be the market price at the date of the donor's death. I accept that decision, which was upheld by the Privy Council in *Attorney-General for Ontario* v. *National Trust Co., Ld.* (2), and it is therefore the fact that in the case before me the ordinary shares which

(1) 1929 S. C. 800.

(2) [1931] A. C. 818.

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will anyhow bear the duty were (partly owing to the distribution of the reserves by way of bonus shares in 1935) less valuable and so less productive of duty than they would have been if that distribution had not taken place. That, of course, leaves unanswered the question what value the shares would have had if the reserves had been distributed by way of dividend, as they might quite well have been.

Then came *In re Payne's Declaration. Poplett* v. *Attorney-General* (1), where the subject of the gift was settled and included the benefit of an option. The result was that on the date of death 10,000*l.* and an option had become shares worth about 49,000*l.* Simonds J. held that in the case of settled funds the trust fund, in the condition in which it was at the date of the death of the donor, must be valued at the date of the donor's death, but he in terms confined his decision to the case of settled funds. Indeed, the whole of the argument and the grounds for the decision, showed why the learned judge so confined his decision. Mr. Stamp says that the Act makes no special reference to settlement, and that if settled funds can be followed through such changes that is only because there is an underlying identity and that Simonds J. must have relied on this. The report of the case discloses no such necessity. In the case of a trust fund the problem of identity is solved, or, at any rate, eased, by the circumstances which always surround such a fund, even if the definition section in the Act is not applicable. In the case before me I have no such artificial aid to identification and the definition section does not, as I have pointed out, apply. On the other hand, if I am to adopt what Lord Sands said was the right course in *Strathcona (Lord)* v. *Inland Revenue* (2), and to treat the matter as though Mr. Tate had kept these shares till he died, bequeathing them by will at the moment of the gift, then, having regard to the date of the distribution of the bonus shares, the result is clear from *In re Kuypers.* (3) The bonus shares would not have gone to the defendant by reason of such a bequest.

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(1) [1939] Ch. 865.
(2) 1929 S. C. 800.
(3) [1925] Ch. 244.

Incidentally, there will be found in the judgment of Tomlin J. in that case some interesting observations on how to trace and identify shares where an additional issue, not unlike the one in this case, had taken place.

I do not, however, base my decision on this ground. I look at the words of this taxing Act. I believe I look at the substance of it, in so far as its substance is to be gathered from its words. It might have contained words which would include these bonus shares. In fact it contains no such words. I apply the simplest test that can be used. I will assume that it had been to the defendant's interest to make out that in fact her father gave her these bonus shares. Could she truthfully have sworn that she received these bonus shares from her father? It is apparent, anyhow to me, that if she had so sworn she would be guilty, if not of perjury, at any rate of concealing the truth, and for this simple reason I find that the bonus shares which the company chose to distribute to the defendant were not taken by her under the only disposition which can be relied on, namely, the gift of the ordinary shares on January 26, 1934.

Judgment for defendant.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for the defendant: *Pennefather & Co.*

J. W. H.

FRIIS *v.* PARAMOUNT BAGWASH COMPANY, LIMITED.

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County court—Costs—Remitted action—Costs of successful defendant—Order constituting final judgment—Jurisdiction of judge to make further order as to costs—County Courts Act, 1934 (24 & 25 *Geo.* 5, *c.* 53), *ss.* 47, 73.

An award of costs, without more, to a successful defendant in a remitted action entitles him to High Court costs down to the order of transfer and to county court costs thereafter.

In a remitted action the county court judge made an order that a certain sum should be paid into Court by the plaintiff within fourteen days as security for the costs of an adjournment, and that, if the sum specified was not paid into Court within the fourteen days, the action should be dismissed with costs. The security was not paid into Court within the fourteen days. Subsequently, the county court judge, on the application of the defendants, made a further order as to costs:—

Held, that the first order made by the county court judge constituted a final judgment between the parties, and that, therefore, he had no jurisdiction to make the further order which he purported to make.

Appeal from Woolwich County Court.

The plaintiff sued the defendant company for some 40*l.*, alleged to be due for secretarial and accountancy charges on a balance of account. The action was started by specially indorsed writ in the High Court, dated November 15, 1938, and on November 28, 1938, an order was made that the defendant company be at liberty to defend the action, and the matter be remitted to the Greenwich County Court. In the county court the plaint was issued on December 9, 1938, and a defence and counterclaim put in, the latter being for 28*l.* 18*s.* 3*d.*, said to be money recovered by the plaintiff from the Inland Revenue Authorities and converted by the plaintiff to his own use instead of being accounted to the defendant company, and also for the return of certain books of the defendant company, and damages for their detention.

The case came before the county court judge on July 5, 1939, and, the plaintiff having given his evidence in chief, his cross-examination was adjourned until October 11. On that date, the plaintiff, being represented by another counsel who was not then ready to proceed with the argument, by agreement the following order was made: "It is ordered "that the hearing of this action be adjourned to a date to "suit the convenience of both counsel. Costs thrown away "to be the defendants' in any event—10*l.* to be paid into "Court by the plaintiff, Eric Friis, within fourteen days, as "security for the costs of the adjournment. If the costs of "the adjournment are in excess of 10*l.* the plaintiff, Eric Friis, "to make up the difference—if less the difference to be allowed "to the plaintiff. If the said sum is not paid into Court "within fourteen days, then action to be dismissed with "costs and counterclaim dismissed without costs. The "books and articles referred to in the counterclaim herein "to be returned by the plaintiff to the defendants forthwith— "such return to be without prejudice to the plaintiff's rights."

The security was not paid, and the case fell, therefore, to be dismissed under the order, but on November 17, 1939, the solicitors to the defendants applied to the county court asking for an order to deal with outstanding costs. The county court acceded to the application, and a further order was made as follows: "Upon application being made at a "Court holden this day and upon hearing learned counsel "for the plaintiff and the defendants, It is ordered that (1.) "The costs of this action be allowed to the defendants on the "High Court scale up to the date of remission and on Scale B "thereafter. (2.) The whole of the costs of the oral "examination of the witness, Leonard Ambrose, senior, "taken on behalf of the defendant company, be allowed. "(3.) The costs of application to have the case struck out "because of non-compliance with the registrar's order of "June 26 be allowed. (4.) The costs of settling the defence "by learned counsel be allowed. (5.) The costs of this "application to be the defendants' and to include a certificate "for counsel. (6.) Costs not specifically dealt with to follow "the event and to be costs in cause. (7.) Liberty to apply. "(8.) Leave to appeal refused."

From this order the plaintiff appealed. The appeal was heard on February 6, 1940.

E. M. Hoy for the appellant. The order of October 11, 1939, constituted a final judgment between the parties, since the security there mentioned was not paid within fourteen days. As it was provided that in that event the action should be dismissed with costs and the counterclaim dismissed, there remained nothing to be done but for the registrar to tax the costs in accordance with the provisions of Order XLVII. of the County Court Rules. The judge having given final judgment, had no jurisdiction to make the further order which he purported to make on November 17, 1939.

[SLESSER L.J. referred to *White* v. *Altrincham Urban District Council.* (1)]

That case has no application in the present case as it never went to the registrar to tax the costs.

Astell Burt for the respondents. A county court judge has power to supplement his judgment as to costs, but not to vary it. This is a remitted action, and under s. 73 of the County Court Act, 1934, the costs in a remitted action are in the sole discretion of the county court judge. The county court judge was not functus officio when he made the order of October 11, because he left certain matters outstanding. Where after judgment a supplemental order as to costs (as to which the judgment is silent) is made on motion, it must be treated as part of the judgment, and not as an interlocutory order: see *The City of Manchester.* (2) In *Cobbold* v. *Garrett* (3) Eve J. delivered judgment in favour of the plaintiff with costs on July 30, and on January 11 of the following year he made an order by which the costs of a commission to take evidence abroad were included in the costs of the action. A judge has power to deal with costs which he has not dealt with in his judgment. When a judge has a discretion as to costs and has not exercised it he may be asked to exercise that discretion after he has made a final order. Under s. 73 of the County Court Act, 1934, the discretion as to costs is conferred on the county court judge and not on the registrar.

(1) [1936] 2 K. B. 138.
(2) (1880) 5 P. D. 221.
(3) [1929] W. N. 16.

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[Slesser L.J. In *Marsden* v. *Lancashire and Yorkshire Ry. Co.* (1) the judge at the trial entered judgment for the plaintiffs, but without costs. The High Court afterwards made an order that the plaintiffs should have their costs. The Court of Appeal held that the High Court had no jurisdiction to vary the judgment. That decision is conclusive of the present matter. Luxmoore L.J. referred to *Haile* v. *West.* (2)]

In *Forbes-Smith* v. *Forbes-Smith* (3) an order was made after the final decree that the co-respondent should be ordered to pay costs, although there was no reservation of costs. If it is clear that a county court judge in making his final order has not exercised his discretion as to costs, the successful party can afterwards ask him to exercise his discretion. If the argument on behalf of the plaintiff is correct the matter can never come before the county court judge for him to exercise his discretion under s. 73 of the County Courts Act, 1934, because the action has been dismissed. It was held in *Fritz* v. *Hobson* (4), that in every order of the Court liberty to apply is implied, without being expressly reserved and that under such liberty the Court had jurisdiction to order the payment of certain costs which were not asked for when judgment was given. [He also referred to *Gold Bros. and Nash, Ld.* v. *Fuller* (5) ; *Davies* v. *Davies* (6) ; and *Goadby* v. *Orridge.* (7)]

E. M. Hoy replied.

Cur. adv. vult.

1940. Feb. 12. Slesser L.J. read the following judgment of the Court (Slesser, Luxmoore and Goddard L.JJ.) [in which he stated the facts, and continued :] The plaintiff's case, which appears to us to be well founded, is that the order of October 11, 1939, constituted a final judgment between the parties in the event which happened, namely, that the security there mentioned was not paid within fourteen days so that, it being provided that in that event the action should be dismissed with costs and the counterclaim dismissed without costs, there remained nothing to be done but for the registrar to tax the costs in accordance with the provisions of Order XLVII. of the County Court Rules. The judge, it is said, having given final judgment, had no jurisdiction to make the further order which he purported to make on November 17, 1939.

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(1) (1881) 7 Q. B. D. 641.
(2) [1939] W. N. 390.
(3) [1901] P. 258.
(4) (1880) 14 Ch. D. 542.
(5) [1925] W. N. 264.
(6) [1928] 1 K. B. 364.
(7) [1938] 1 K. B. 641.

It is clear that the matters dealt with in cls. 2, 3, 4 and 6 of the order made on November 17 are mere matters of taxation with which the judge had no concern unless they came before him on application to review. Clauses 5, 7 and 8 are incidental to an order which, in our opinion, the judge had no jurisdiction to make. This leaves only cl. 1, with which Mr. Burt's argument was mainly concerned, but in our opinion the order of October 11 had already dealt fully and finally with this matter. Under that order the registrar was bound to tax the costs in exactly the way that cl. 1 of the order directed. Our reasons for so holding can be stated quite shortly.

Under s. 47 of the County Courts Act, 1934, if a plaintiff brings an action in the High Court which could have been brought in the county court, he either gets no costs or only county court costs, according to the amount which he recovers, unless the judge makes a special order giving High Court costs. That section does not deal with the costs of a successful defendant, and there is no reason why it should. If the action fails and the defendant is awarded costs, it follows that he gets High Court costs, and no special order is required for the taxation to be on that scale. He has been brought to the High Court and so he gets the costs applicable to the Court in which he is sued. The object of the section is to discourage plaintiffs from proceeding in the High Court when they might sue in the county court, not to penalize defendants who have not the choice of forum. If an action is remitted to the county court exactly the same considerations apply. Under s. 73, the county court is given a general power over the costs of remitted actions, so that it can deal

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not only with costs incurred after, but also before, remission in so far as they have not already been dealt with in the order for transfer, but it is provided that the costs in the High Court are to be subject to the provisions of s. 47, which, as we have already said, does not deal with the defendant's costs at all. The county court judge can, of course, for good reasons, deprive a successful defendant of costs, and, were he to do so, that would apply to all costs, whether incurred before or after transfer, but, if he awards him costs, it must, in our opinion, follow that the defendant is entitled to all the costs to which he has been put—subject, of course, to taxation—by reason of the plaintiff bringing an action against him which has failed. The defendant, therefore, who is given judgment with costs in a remitted action, is without more entitled to tax on the High Court scale down to the transfer and on the appropriate scale thereafter.

It is unnecessary to decide whether, under the earlier words of s. 73, the county court judge could say that the defendant is only to have his costs before transfer on the county court scale, but at present we have not been able to visualize any case in which it would be right to make such an order, and we have great doubt if there is any power to do so.

If a plaintiff only gets county court costs a notional bill has to be taxed. For instance, he gets the costs of a plaint and not of a writ. But considering, except in special cases, such as Admiralty actions and Workmen's Compensation arbitrations, there is no such thing as entering an appearance in the county court, no notional bill could be prepared on behalf of a defendant, so, if a defendant in a remitted action were only given costs of the High Court proceedings on the county court scale, he would, as it seems to us, be unable to recover the very first expense which he must incur to defend himself against what is, ex hypothesi, an unfounded claim.

In our opinion, it is clear that an award of costs, without more, to a successful defendant in a remitted action, gives him High Court costs down to the order of transfer and to county court costs thereafter.

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The order of October 11 was, therefore, in all respects a final order. The application to the Court on November 17 was not only unnecessary, but was one on which the judge had no jurisdiction to make any order, and it ought to have been dismissed with costs to the plaintiff. The judgment of the Court, therefore, is that this appeal succeeds with costs.

Appeal allowed.

Solicitors to appellant: *Morris & Sons.*
Solicitors to respondents: *Wedlake, Letts & Birds.*

R. F. S.

C. A.

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Feb. 7, 8; *Mar.* 4.

TIBBER *v.* UPCOTT.

Landlord and tenant—Rent restriction—Premises decontrolled on landlord resuming possession—Failure to register as decontrolled—Subsequent repeal of sections relating to registration—Preservation of vested interests—Premises still controlled for want of registration—Increase of Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-s.* 1—*Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 2—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3; *s.* 9, *sub-s.* 3; *Sch. II.*

A dwelling-house rated at all material times at less than 20*l.* per annum became decontrolled as the result of the landlord resuming possession of the premises in 1932, but by a mistake the premises were not registered as decontrolled as provided by s. 2, sub-s. 2, of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. In an action by the landlord to recover arrears of the rent at which the premises had been let in the belief that they were decontrolled premises:—

Held, (1.) that as a result of the failure to register the premises as decontrolled premises as required by s. 2, sub-s. 2, of the Act of 1933, the premises had become controlled premises; (2.) that the meaning of s. 2, sub-s. 2, of the Act of 1933 was not that failure to register only effected decontrol so far as any proceedings were concerned; and (3.) that as a result of the failure to register, the defendant as tenant had acquired vested rights which were preserved by s. 38 of the Interpretation Act, 1889, although s. 2 of the Act of 1933 had been repealed by the Rent and Mortgage Interest Restrictions Act, 1939, Sch. II., before these proceedings were commenced.

Stokes v. *Little* [1935] 1 K. B. 182 followed on the first point.

APPEAL from Judge Haydon, sitting at the Kingston County Court.

The plaintiff was the landlord of two flats, being Nos. 4 and 4A, Clarence Road, Wimbledon, which were dwelling-houses rated at less than 20*l.* per annum and therefore controlled premises under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The plaintiff employed agents for the letting and collection of his flats. On September 5, 1932, the then tenant vacated flat No. 4, with the result that it was decontrolled by virtue of the Increase of Rent and Mortgage Interest Restrictions Act, 1923, s. 2. On September 12, 1932, the premises were let to Mr. Wilde at the decontrolled rent of 22*s*. 6*d*., and thereafter were let to various successive tenants at about this rent until on April 12, 1937, the flat was let to the present defendant at 21*s*. a week. The defendant having fallen into arrears in the payment of this rent the plaintiff commenced proceedings on October 25, 1939, to recover 20*l*. 11*s*. 8*d*., being the arrears of rent to October 23, 1939. The defendant by his defence denied that he owed any arrears of rent and claimed that the premises were controlled premises within the provisions of the Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1939.

It appeared from the evidence that when the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, was passed and it became necessary under s. 2, sub-s. 2, for the landlord to register the premises if he claimed that the premises were decontrolled, a mistake was made by the agents who registered flat 4A instead of flat 4 in manner required by the Act, and the defendant claimed that as flat 4 was not registered within the period required by the section, the premises had become and had since continued to be controlled premises so that a far smaller rent was payable in respect of the flat.

The county court judge said that he had admitted evidence that a mistake was made in registering flat No. 4A instead of No. 4 as decontrolled, but he was of opinion that the mistake was irrelevant. The register was a public document and he was not aware of any power to rectify it. Nor if he had such a power would he see any reason to exercise it and no request had been made for him to do so. He did not think *Holt* v. *Dawson* (1) assisted the plaintiff. Apart therefore from the effect of the Rent and Mortgage Interest Restrictions Act, 1939, the flat was a controlled dwelling-house of the C class and the rights and liabilities of the landord and tenant were established on that basis.

For the plaintiff it was contended that, even if that were so, the Act of 1939 had obliterated all questions of registration and that the rent recoverable from the tenant was that which he had agreed to pay. He thought that if that had been the intention of the Legislature, such intention would have been clearly expressed. Counsel's argument was that the Act of 1939 by repealing s. 2 of the Act of 1933 and s. 4 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938 (in Sch. II. to the Act of 1939), had done away with registration altogether except in so far as pending proceedings were concerned, and that the present action having been commenced on October 25, 1939, after the Act of 1939 had come into operation, was not then a "pending proceeding." He contended that the words "if in any proceedings" in s. 2, sub-s. 2, of the Act of 1933 (1), meant any proceedings commenced while the sub-section was law and that the repeal of a statutory provision dealing with procedure only operated retrospectively. He relied on s. 38 of the Interpretation Act, 1889, and *The Ydun* (2), in this connection.

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(1) [1940] 1 Ch. 46.

The defendant's contention was that the Act of 1939 only created a new standard of rent for houses brought into control by that Act and that he had acquired a right to be charged only the controlled rent under the earlier Acts which was preserved by s. 38, sub-s. 2 (*c*), of the Interpretation Act, 1889. This contention was correct and the case must go to the registrar to ascertain the controlled rent.

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(1) Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 2, sub-s. 1: "Subject as "hereinafter provided, section two "of the Act of 1923 (which pro- "vides for the exclusion of dwel- "ling-houses from the application "of the principal Acts in certain "cases) shall not apply to any "dwelling-house of which the "rateable value on the appointed "day did not exceed—(*a*) in the "metropolitan police district ". . . . twenty pounds . . . ." Sub-s. 2: "If the landlord of "any dwelling-house let as a "separate dwelling immediately "before the passing of this Act, "being a dwelling-house of which "the rateable value on the ap- "pointed day did not exceed the "respective amount mentioned "in the last foregoing sub-section, "claims that by virtue of the "provisions of the said section "two of the Act of 1923 the "principal Acts had ceased to "apply to the dwelling-house "before the passing of this Act, "he shall within three months "after the passing of this Act "make to the council of the "county borough or county dis- "trict in which the dwelling-house "is situated application in the pre- "scribed form for the registration "of the dwelling-house, and if "in any proceedings with respect "to any dwelling-house which "is . . . . such a dwelling-house "as aforesaid, it is proved that "but for the provisions of the "said section two of the Act of "1923 the principal Acts would "have applied to the dwelling- "house and that no such "application has been made by "or on behalf of the landlord "within the time aforesaid, the "dwelling-house shall, subject as "hereinafter provided, be deemed "to be a dwelling-house to which "the principal Acts apply:"

(2) [1899] P. 236.

The plaintiff appealed. The appeal was heard on February 7 and 8, and judgment given on March 4, 1940.

F. W. Beney for the appellant. The question here is whether the premises in question are deemed to be controlled under s. 2, sub-s. 2, of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, or are controlled only under the Rent and Mortgage Interest Restrictions Act, 1939. In the latter case the standard rent is fixed by reference to the rent on September 1, 1939, and the plaintiff is entitled to succeed. In the former case the standard rent is fixed by reference to the rent on August 3, 1920, and the defendant's defence prevails. The failure to register flat 4 as decontrolled as required by s. 2 of the Act of 1933 was due to a mistake and it is suggested that if an application were made to rectify the register it would succeed and that flat 4 ought to be treated as decontrolled: see *Holt* v. *Dawson.* (1)

But even if this is not so, the provisions as to registration in s. 2 of the Act of 1933 and in s. 4 of the Rent and Mortgage Interest (Restrictions) Act, 1938, have been put an end to by the Act of 1939 (see Sch. II., which repeals these provisions). Does it then still leave it open to the defendant to rely on the failure to register under the 1933 Act as causing flat 4 to be controlled premises? It is submitted not, as there was no right accrued to the defendant that would be preserved by s. 38 of the Interpretation Act, 1889. The wording of s. 2, sub-s. 2, of the Act of 1933 is material in this regard. It only provides that "if in any proceedings with "respect to any dwelling-house . . . . it is proved . . . . "that no such application [to register] has been made . . . . "the dwelling-house shall, subject as hereinafter provided, be "deemed to be a dwelling-house to which the principal Acts "apply." That shows that decontrol remains, but that in any proceedings the premises are artificially to be deemed controlled in the absence of registration. That language affords ground for saying that s. 2, sub-s. 2, relates to a mere matter of procedure.

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(1) [1940] 1 K. B. 46.

There is then no accrued right in the defendant, for these proceedings were not commenced until after the Act of 1939 came into force. The words "in any proceedings" and "deemed to be" in s. 2, sub-s. 2, of the Act of 1933, are relied on to show that the operation of the sub-section is procedural only and such a provision when repealed is retrospectively repealed: *Abbott* v. *Minister for Lands* (1) and *The Ydun*. (2)

[SLESSER L.J. referred to *Stokes* v. *Little*. (3)]

That case lends support to the present argument apart from a dictum of Lord Wright that s. 2, sub-s. 1, of the Act of 1933 operated to make all premises with a rateable value of under 20*l*. controlled premises subject only to the qualification in sub-s. 2. That point was not touched upon by the other judges and was immaterial to the decision. Sect. 2, sub-s. 1, was intended only to prevent the future application of s. 2 of the Act of 1923 to premises with a rateable value of under 20*l*. It will not be given a retrospective effect so as to deprive the landlord of his rights, for the language does not require it: *In re Athlumney* (4); *Lauri* v. *Renad* (5); Maxwell's Interpretation of Statutes, 7th ed., p. 189. The position remained under the Act of 1933 that premises of a rateable value of under 20*l*. which had become decontrolled under s. 2 of the Act of 1923 before the Act of 1933 came into force remained so, and only in proceedings relating to the premises were they to be deemed controlled if there had been a failure to register.

[LUXMOORE L.J. When an obligation is imposed by statute the provision imposing the penalty for a breach is always treated as of general application. Under s. 2, sub-s. 2, of the Act of 1933 the landlord who "claims" that his house is decontrolled is required to register. "Claims" cannot be limited to cases where a legal claim is being made.]

Even if "claims" bears the wider sense, there would, if

(1) [1895] A. C. 425.
(2) [1899] P. 236, 243.
(3) [1935] 1 K. B. 182, 190.
(4) [1898] 2 Q. B. 551.
(5) [1892] 3 Ch. 402, 421.

failure to register within three months automatically rendered unregistered premises controlled premises, have been no reason for inserting the words relied on in sub-s. 2. The effect of registration is discussed in *Pearman* v. *Dyer* (1) where *Aronson* v. *Barker* (2) is discussed.

S. N. Bernstein for the respondent. The whole difficulty of this case arises from the language of s. 2, sub-s. 2, of the Act of 1933. It is to be noticed that s. 3, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, repealed s. 2 of the Act of 1923, but s. 4, sub-s. 1, gave an extended power of registration of decontrolled premises for a limited time for houses rated at somewhat higher values than those covered by s. 2 of the 1933 Act. Sch. II. of the Act of 1939, in repealing s. 2 of the Act of 1933, and s. 4, sub-s. 1, of the Act of 1938, was merely repealing provisions which had lost their value because the power of registration had ceased. But that does not affect the position of houses which had become controlled under the 1933 Act on failure to register. The appellant seeks to limit the effect of s. 2, sub-s. 2, of the 1933 Act, by relying on the words " in any proceedings ", but it is only in proceedings that the question whether premises are controlled or decontrolled is put to the test. The effect of a failure to register was to make the premises to which the sub-section applied controlled premises: see *Stokes* v. *Little*. (3) The defendant had a vested interest as tenant of the premises which is preserved to him by the Interpretation Act, 1889, s. 38. [He was stopped.]

F. W. Beney replied.

Cur. adv. vult.

1940. March 4. SLESSER L.J. The judgment of the Court (LUXMOORE and GODDARD L.JJ. and myself) will be read by Luxmoore L.J.

LUXMOORE L.J. On October 25, 1939, Maurice Tibber sued the defendant, T. H. Upcott, in the Kingston-on-Thames

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(1) [1935] 2 K. B. 149, 154.

(2) Estates Gazette for Oct. 27, 1934.

(3) [1935] 1 K. B. 182, 194.

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County Court, for the sum of 20*l.* 11*s.* 8*d.*, claimed to be arrears of rent for a flat known as No. 4, Clarence Road, Wimbledon, which the plaintiff had let on April 12, 1937, to the defendant at a weekly rent of 21*s.*

The defendant resisted the plaintiff's claim on the ground that the premises were, at all material times before the passing of the Rent and Mortgage Interest Restrictions Act, 1939, controlled premises within the provisions of the Rent and Mortgage Interest (Restrictions) Acts, 1920–1938; and on this basis he alleged that he had paid to the plaintiff more rent for the flat than the plaintiff was legally entitled to require.

The action came before His Honour Judge Haydon at the Kingston-on-Thames County Court by way of preliminary hearing, in order to determine the legal questions raised. The judge decided that the premises were not decontrolled at any material date; and that the defendant's rights in respect thereof having all arisen before the passing of the Act of 1939, are to be ascertained under the provisions of the earlier Acts. He therefore remitted the action to the registrar to ascertain the amount of the controlled rent, and to quantify the rights of the parties to the action as the result of such ascertainment.

The plaintiff has appealed to this Court from the judge's order. He claims that, upon the true construction of the material provisions of the Rent and Mortgage Interest Restrictions Acts, 1920–1939, the premises were decontrolled immediately before the Act of 1939 came into force; and that, although, as is admitted, they became again controlled by reason of the provisions of the 1939 Act, the proper rent which the plaintiff is entitled to require the defendant to pay for the premises is the 21*s.* per week agreed to be paid on April 12, 1937; and that that rent is the rent prevailing at the date when the Act of 1939 came into force.

The material facts are as follows: The plaintiff is, and was at all material times, the owner of a building in Clarence Road, Wimbledon, which contained two separate dwellings within the meaning of the Acts. One of these dwellings was known as No. 4, and the other as No. 4A, Clarence Road.

It is common ground that each of these dwellings was controlled on July 31, 1923, the date of the passing of the Rent and Mortgage Interest Restrictions Act of 1923. In the year 1932 No. 4, Clarence Road, was let to a tenant named Weaver. He left the premises on September 5 of that year, and before there was any reletting the plaintiff came into possession of them. No. 4, Clarence Road, therefore, became decontrolled on September 5, 1932, by reason of the provisions of s. 2 of the Act of 1923. The plaintiff subsequently let the premises to a Mr. Wild, at a weekly rent of 22*s.* 6*d.*; and subsequently there were other lettings. On April 12, 1937, the premises were let to the defendant at a weekly rent of 21*s.* payable in advance. The defendant's claim is that, at the date of the letting to him, the premises were controlled by reason of the failure of the landlord to comply with the provisions of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. Sect. 2, sub-s. 2, of this Act provides that if the landlord of any dwelling-house let as a separate dwelling immediately before the passing of the Act (that is, July 18, 1933), being a dwelling-house of which the rateable value on the appointed day (that is, April 6, 1931), did not (as is admitted in this case) exceed the amount mentioned in the preceding sub-section, claims that, by virtue of the provisions of s. 2 of the Act of 1923, the principal Acts had ceased to apply to the dwelling-house before the passing of this Act, he shall, within three months after the passing of this Act (that is, the Act of 1933), make to the council of the county borough or county district in which the dwelling-house is situated (in this case the County Borough of Wimbledon) application in the prescribed form for registration of the dwelling-house. So far the provisions of the sub-section appear to be straightforward. The difficulties of the case arise from the concluding part of the sub-section, which is as follows: "If in any "proceedings with respect to any dwelling-house which is, "or immediately before the passing of this Act formed part of, "such a dwelling-house as aforesaid, it is proved that but for "the provisions of the said section 2 of the Act of 1923 the "principal Acts would have applied to the dwelling-house "and that no such application has been made by or on behalf "of the landlord within the time aforesaid, the dwelling-house "shall, subject as hereinafter provided, be deemed to be a "dwelling-house to which the principal Acts apply." This sub-section is followed by a proviso to which reference is made later.

It is common ground that no application was made by or on behalf of the plaintiff for the registration of No. 4, Clarence Road, as a decontrolled house, in accordance with the provisions of the sub-section which has been read. No doubt there was an intention to comply with the sub-section ; but, by mistake, the plaintiff applied for and obtained the registration, on July 18, 1933, of No. 4A, Clarence Road, as a decontrolled dwelling-house. The county court judge pointed out that, even if there had been an application to rectify the register, he had no power so to do.

The proviso to the section is in these terms : "Provided "that if, on application to the county court of the district "in which the dwelling-house is situated, the court certifies "that there was reasonable excuse for the failure to make "application for the registration of the dwelling-house within "the time aforesaid" (that is the three months after the passing of the Act) "and application for registration is made "within seven days after the certificate has been granted, "then if the principal Acts had ceased to apply to the "dwelling-house before the passing of this Act, section 2 of "the Act of 1923 shall, notwithstanding anything in the last "foregoing sub-section, apply to the dwelling-house as from "the date on which the application for registration is made." No application was made under this proviso in respect of No. 4, Clarence Road.

The result of the failure to apply for the registration of No. 4, Clarence Road, as a decontrolled house appears to be that the premises became recontrolled as from July 18, 1933. In our judgment this follows from the decision of this Court in *Stokes* v. *Little*. (1) In that case a house of which the standard rent while it was controlled was 8*s*. 6*d*. per week,

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(1) [1935] 1 K. B. 182.

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came into the possession of the landlord on October 10, 1932, and thereupon became decontrolled by reason of the provisions of s. 2 of the Act of 1923. The landlord failed to register the dwelling-house as a decontrolled house within the period of three months from the passing of the Act of 1933, as required by s. 2 of that Act, but subsequently obtained from the county court a certificate that there was reasonable excuse for the failure to register. The landlord duly made the application for registration within the time limited by the Act of 1933, and registered the premises. The Court of Appeal held that the effect of the registration was to place the dwelling-house, as from the date of such registration, in the same position as if it had been registered within the three months allowed by the Act; and that the landlord suffered no further detriment through the delay than such as might result from the application of the Act of 1933 between the date of the passing of that Act and the application to register. Lord Wright said (1): "Section 2 of the Act of 1933 first of "all enacts that section 2 of the Act of 1923 (which provides "for the exclusion of dwelling-houses from the application of "the principal Act in certain cases) shall not apply to the "classes of houses there specified. The effect so far is not "only to stop future claims that such houses are entitled to "be excluded, but to bring back into the Act subject to the "qualifications set out even those houses of the specified "rental or rateable values which had been excluded by "section 2 of the Act of 1923, and to abrogate the rights "vested in the landlords by that section. This is no doubt "a harsh measure, but Parliament which gave can take "away. The words 'shall not apply,' accordingly refer in "this way to the past operation of section 2 of the Act of 1923."

It seems to us that it is implicit in this decision that, in the event of non-compliance with the provisions as to registration, whether under the first part of sub-s. 2, or under the proviso thereto, the dwelling-house is again brought within the principal Acts, and becomes, by reason of the non-registration, a controlled dwelling-house.

(1) [1935] 1 K. B. 190.

Slesser L.J. said (1): "It is scarcely disputed that had the "landlord duly registered before October 18, 1933, she would "have been able to have claimed that section 2 of the Act "of 1923 would have applied: that, having been in possession, "and having satisfied the requirements of section 2 of the "Act of 1923, her dwelling-house would have been outside "the Act. To my mind the proviso does no more, when its "conditions are satisfied, than to postpone the date when "the landlord may claim that her dwelling-house is excluded "from the Act to the date of the application for registration "which follows upon the certificate. To give any further "effect to this proviso and to hold, as the learned judge appears "to have done, that the proviso does no more than give the "landlord a right after the registration to enter into possession, "and for the first time to take advantage of section 2 of "the Act of 1923, is to hold that the proviso, when satisfied, "has produced an entirely new legal situation, with consequences different from the case where registration is within "the three months of the passing of the Act, and that the "proviso is not merely dealing with the correction of an "omission, with consequences as to the time to which rights "may be postponed, but is assuming that, after the lapse of "the first period for registration, the subsequent registration "will produce a more restricted legal right in the landlord "by excluding her right to rely upon the fact that she has "already once entered into possession, and to require a further "new entry."

Mr. Beney has, however, argued on behalf of the plaintiff landlord that the effect of sub-s. 2 of s. 2 of the Act of 1933, in the event of its provisions as to registration not being complied with, is limited with regard to recontrol. He claimed that, once a dwelling-house has been decontrolled under the provisions of s. 2 of the Act of 1923, failure to register under s. 2 of the Act of 1933 only affects the decontrol so far as "any proceedings" are concerned; so that, apart from such proceedings, the dwelling-house remains decontrolled.

The section is obviously difficult to construe. If Mr. Beney's contention is correct, we find it impossible to formulate any purpose for which the decontrol is to remain effective, because all that is required to establish that the dwelling-house has become recontrolled, is to start proceedings and to establish therein that there has been no application for registration under s. 2 of the Act of 1933.

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(1) [1935] 1 K. B. 197.

In our judgment the true meaning of s. 2 of the Act of 1933 is that, in the absence of registration under its provisions, a dwelling-house which has become decontrolled under s. 2 of the Act of 1923, becomes for all purposes of the principal Acts a controlled house.

Mr. Beney further argued that the provisions of s. 2 of the Act of 1933 were concerned solely with matters of procedure, and that, consequently, such provisions ceased to have any operation after they had been repealed by the Increase of Rent and Mortgage Interest Restrictions Act, 1939 (see s. 9, sub-s. 3, and the Second Schedule to that Act).

As already pointed out, we are of opinion that s. 2 of the Act of 1933 is not concerned merely with procedure; but gives to a dwelling-house falling within its provisions the status of a controlled dwelling-house. Further, we think that, under the Act of 1933, the tenant of a house within the provisions of s. 2 of that Act acquired, by reason of the failure of the landlord to comply with the provisions of that section, such rights and benefits as attach to a house controlled under the principal Acts. There is nothing in the 1938 Act which can be construed as depriving the tenant of such rights; and we are satisfied that, by reason of the provisions of s. 38 of the Interpretation Act, 1889, the defendant as such a tenant is entitled to enforce his vested rights.

For these reasons, we agree that the decision of the learned county court judge is right; and, consequently, that the appeal must be dismissed with costs.

Appeal dismissed.
Leave to appeal to the House of Lords on terms.

Solicitors: *Paisner & Co.; Barnett Janner.*

H. C. G.

C. C. A.
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Mar. 11, 19.

REX *v.* CARMICHAEL.

Criminal law—Incest—Evidence—Father and daughter—Defence of lack of knowledge of relationship—Allegation of illegitimacy of daughter—Admissibility—Punishment of Incest Act, 1908 (8 *Edw.* 7, *c.* 45), *s.* 1, *sub-s.* 1.

The appellant, when charged with incest with his daughter, set up the defence that at the material time he did not know that the girl was his daughter. To substantiate that defence, he sought to give evidence that his first wife (the girl's mother) had told him that the girl was not his daughter but had been begotten by another man, that he believed that statement to be true, and that he had told his second wife that he was not the girl's father. He also wished to explain how it was that on certain occasions he had acknowledged the girl as his daughter. The judge, however, held that the rule in *Russell* v. *Russell* [1924] A. C. 687 precluded the appellant from giving this evidence:—

Held, that the rule in *Russell* v. *Russell* did not preclude the appellant from giving the evidence in support of his defence that he did not know that the girl was his daughter.

APPEAL against conviction.

The following statement of facts is taken from the judgment of the Court:—

On February 8, 1940, at the Central Criminal Court, before Wrottesley J., the appellant, John Kinnear Carmichael, was convicted of incest with his daughter, Sonia May Carmichael, and was sentenced to two years' imprisonment. He now appealed against his conviction on the grounds of the wrongful exclusion of evidence.

The indictment contained three counts. The first count charged that on a date unknown between June 1, 1932, and May 2, 1933, the appellant "had carnal knowledge of Sonia "May Carmichael, who was to his knowledge his daughter." The second and third counts charged the commission of similar offences between August, 1934, and August, 1937.

On September 2, 1912, the appellant married Frances May Parker at the register office at Edmonton in Middlesex and there were two children of the marriage, namely, Elsie Frances Carmichael, born on April 11, 1913, and Sonia May Carmichael

—the subject of the present charge—born on May 18, 1915. The appellant was admittedly the father of the elder daughter, Elsie Frances. Throughout the whole of 1914 the appellant's wife lived at Cambridge and the appellant resided in London, where he was engaged in a motor business, and during that year he used from time to time to visit his wife at week-ends. There was evidence that about August, 1914—nine months before the birth of Sonia May Carmichael—the appellant's wife was associating with a man named Harry West, who was giving her lessons in motor driving, but there was no evidence of any misconduct by her with West at that time. In January, 1915, the appellant enlisted in the Army, and in the autumn of that year he went with his regiment to France. While the appellant was away in France his wife committed adultery with West, and on November 17, 1916, the appellant presented a petition for divorce and cited West as co-respondent. The petition alleged that during 1916 Mrs. Carmichael had frequently committed adultery with West and that she was at that date pregnant by him. On this petition a decree nisi was pronounced and in due course the decree was made absolute and the marriage was dissolved. On July 10, 1918, the appellant married a Miss Violet May Garrick. After the dissolution of his first marriage, the two girls, Elsie and Sonia, lived under the care of the appellant's mother, but in 1926 they went to live with the appellant and his second wife. In 1932 the appellant and his second wife quarrelled and separated. The rupture between them was due to the fact that Mrs. Carmichael became suspicious about the appellant's feelings towards Sonia. After this separation from his second wife the appellant lived with Sonia and between the dates mentioned in the indictment she gave birth to three children. The appellant was admittedly the father of those children and there was ample evidence that on a number of occasions he had acknowledged that he was the father of Sonia. In his petition for divorce and in his affidavit verifying the petition he had stated that there was " living issue of the marriage two "children, namely, Elsie Frances Carmichael, born on April "11, 1913, and Sonia May Carmichael, born on May 18, 1915."

At the trial, the appellant, to substantiate the defence that, when intercourse took place between him and Sonia, he did not know that she was his daughter, sought to give evidence of a statement to him by his first wife at the time of Sonia's birth that the child was not his but had been begotten by another man, that he honestly believed that statement to be true, and that he had told his second wife that Sonia was not his daughter. He also wished to explain how it was that on certain occasions he had acknowledged Sonia as his daughter. Wrottesley J., however, held that the rule in *Russell* v. *Russell* (1) applied to the case and that no statement by the appellant or his first wife which tended to bastardize any issue of that wife born in wedlock could be admitted. He directed the jury to disregard all statements made by the appellant or his first wife which tended to bastardize Sonia.

The appellant appealed on the following grounds: (*a*) that Wrottesley J. was wrong in law in holding that the rule in *Russell* v. *Russell* (1) applied to the case and that no statement by the appellant or his first wife which tended to bastardize any issue of that wife born in wedlock could be admitted; (*b*) that the learned judge misdirected the jury in his summing up when he told them to disregard all statements made by the defendant or his first wife which tended to bastardize Sonia May Carmichael; and (*c*) that the learned judge thus wrongly excluded vital evidence tending to show that the appellant did not know that Sonia May Carmichael was his own daughter.

Edward Clarke for appellant. Wrottesley J. was wrong in excluding the evidence sought to be given by the defence and in directing the jury as he did. The rule that a spouse is not permitted to give evidence of non-intercourse after marriage to bastardize a child born in wedlock applies where legitimacy is, expressly or impliedly, in issue, and not where, in a criminal proceeding involving the liberty of the subject, the issue is the defendant's knowledge of some matter. The rule was formerly limited to proceedings where legitimacy was in question: *Goodright* v. *Moss*, per Lord Mansfield. (1) In *Russell* v. *Russell* (2) it was decided that it applied to the divorce proceedings then before the House of Lords because the issue of legitimacy was involved therein: per the Earl of Birkenhead and Viscount Finlay. (3) There was no mention in that case of the application of the rule to criminal proceedings save by Lord Sumner when he mentioned the very facts now before the Court and treated the application to them of the rule as absurd. (4) Although the evidence of a spouse may incidentally tend to bastardize a child it is admissible if it is material on an issue other than one of legitimacy. If the ruling of Wrottesley J. is right, this is the only instance where a defendant to a criminal charge is shut out from substantiating a defence provided for him by statute by his own evidence and that of his wife. He also referred to *Ettenfield* v. *Ettenfield* (5) and *Rex* v. *Hemmings.* (6)

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(1) [1924] A. C. 687.

Geoffrey Howard for the Crown. The law is quite clear and it has been since the earliest days that " the declarations of a "father or mother cannot be admitted to bastardize the "issue born after marriage": *Goodright* v. *Moss*, per Lord Mansfield. (7) That rule is " living and authoritative." It is "not limited to any special class of case. It is absolutely "general in the comprehensiveness of its expression": *Russell* v. *Russell*, per Lord Birkenhead (8), who also said that, the rule being founded on public policy, " it would seem natural "to propose it in all cases to which it applies verbally, provided "that we are still able to bring ourselves within the public "considerations which were the expressed basis of the rule": *Russell* v. *Russell*, per Lord Birkenhead. (9) The evidence tendered by the appellant, although adduced to prove lack of knowledge, also tended to bastardize a child born in wedlock, and it was, therefore, rightly excluded. The hardship resulting from its exclusion is not so great as has been suggested, because it was always open to the appellant to prove aliunde that the girl was not his daughter, or that he did not know that she was his daughter.

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(1) (1777) 2 Cowp. 591, 592, 594.
(2) [1924] A. C. 687.
(3) Ibid. 701, 706.
(4) Ibid. 739.
(5) [1940] P. 96.
(6) [1939] W. N. 47.
(7) 2 Cowp. 592.
(8) [1924] A. C. 698.
(9) Ibid. 700, 701.

Edward Clarke replied.

[CHARLES J. intimated that the Court had decided to allow the appeal, and quash the conviction, but that their Lordships' reason for so doing would be put into writing.]

1940. Mar. 19. CHARLES J. read the judgment of the Court, which, after the facts set out above had been stated, was as follows :—

Incest was made a criminal offence by the Punishment of Incest Act, 1908, s. 1, sub-s. 1, of which provides: "Any "male person who has carnal knowledge of a female person, "who is to his knowledge his grand-daughter, daughter, sister, "or mother, shall be guilty of a misdemeanour." It was, therefore, incumbent on the Crown to prove to the satisfaction of the jury: (*a*) That the appellant was in fact the father of Sonia, and (*b*) That he knew that he was her father. Proof that Sonia was in fact his daughter would not be sufficient to justify a conviction unless it was also proved that the appellant knew that she was his daughter. If the appellant could have proved to the satisfaction of the jury that he believed that she was not his daughter, or even if the jury had reasonable doubt about that matter, he would have been entitled to a verdict of acquittal.

[His Lordship stated the grounds of appeal and continued :] This appeal, therefore, raises an interesting and important question with regard to the application on a trial for incest of the rule of law affirmed by the House of Lords in *Russell* v. *Russell* (1) that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardize a child born in wedlock.

The case for the appellant was this. Conceding that there was no evidence to rebut the presumption that he was the father of Sonia and that the Crown had proved that fact conclusively, the appellant desired to give evidence that his former wife had told him that Sonia was begotten by another

(1) [1924] A. C. 687.

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man, that he honestly believed her statement to be true, and that, therefore, so far from knowing that Sonia was his daughter, he believed the contrary. As proof of the sincerity of his belief he desired to give evidence that he had informed his second wife that he was not Sonia's father. Further, he desired to explain how it came about that in his divorce petition and on other occasions he had acknowledged Sonia as his daughter. The learned judge, however, held that the rule in *Russell* v. *Russell* (1) precluded the appellant from adducing any such evidence, and the question at issue on this appeal is whether that ruling was right.

In our opinion, that ruling was wrong. At the trial the question arose first when the appellant's second wife, who was called as a witness for the Crown, was giving evidence. Mr. Clarke, for the appellant, desired to ask her in cross-examination whether it was not the fact that the appellant had informed her that he was not the father of Sonia, and the learned judge, after hearing the matter argued in the absence of the jury, held that the rule in *Russell* v. *Russell* (1) made any such question inadmissible. After the close of the case for the Crown the appellant gave evidence on his own behalf. The learned judge allowed Mr. Clarke to ask the appellant this question: "At the time you had intercourse "with Sonia did you know she was your daughter?" To that question he replied: "I knew she was not my daughter." Directed, however, by the judge that he must answer the question "Yes" or "No," he replied: "No." Mr. Clarke then proposed to ask the appellant what were his reasons for disbelieving that he was the father of Sonia and he formulated the following question: "Who first informed you that Sonia "was not your daughter?" The answer to that question would have been that it was the mother of Sonia herself who gave him that information. The learned judge, however, disallowed the question on the ground that the answer would infringe the rule in *Russell* v. *Russell.* (1)

With the greatest respect to the learned judge, we think that the question was admissible. Evidence by the appellant that his wife had told him that he was not the father of Sonia was no evidence at all that he was not in fact her father and would be irrelevant and inadmissible on the question of the paternity of the child. In our opinion, such evidence would not in any way infringe the rule in *Russell* v. *Russell* (1): although it was irrelevant to the question of the paternity of Sonia, it was plainly relevant to the question whether the appellant knew that Sonia was his daughter, since, if the jury were satisfied (*a*) that Sonia's mother did in fact tell the appellant that he was not the child's father, and (*b*) that the appellant believed her statement to be true, they would be bound to return a verdict of acquittal. Indeed, by the exclusion of this evidence the appellant was deprived of the right to substantiate his plea that Sonia was not to his knowledge his daughter.

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(1) [1924] A. C. 687.

To preclude a defendant on his trial from giving evidence of his belief and the ground for it seems to us to deprive him of one of the most elementary rights of an accused person and to be a negation of justice where the proof of knowledge or no knowledge is vital to conviction or acquittal. The exclusion of this evidence, moreover, led to the curious result that, while the appellant was permitted to deny on oath that he knew Sonia to be his daughter, not only was he precluded from giving his reasons for believing that he was not her father, but the Crown was also precluded from cross-examining the appellant as to the reasons for his alleged belief. Furthermore, evidence of admissions by the appellant that Sonia was his child had been adduced on behalf of the Crown, yet statements to the contrary by the appellant which might have explained away those admissions were by the ruling excluded.

In our opinion, the rule in *Russell* v. *Russell* (1) did not preclude the appellant from giving any relevant evidence in support of his plea that he did not believe that Sonia was his daughter, including evidence of an admission or confession by her mother.

It is true that Lord Sumner in his dissenting speech in *Russell* v. *Russell* (2) suggests as a reason for differing from the majority of the House of Lords the hardship which the rule would work in an incest case, and instances an example closely approximating the facts of this case. But it is to be observed that he treats the matter as if the words of the statute "who is to his knowledge his . . . . daughter" form no ingredient in the offence. Thus he says: "His one defence "is that, though born of his wife during their marriage and "brought up as his child to avoid scandal, he had not begotten "her . . . . If he can give this evidence, he has a defence to "go to the jury; if, on the other hand, the rule applies . . . . "he will go to prison." In our opinion, the question whether A is B's daughter is totally distinct from the question whether to B's knowledge she is his daughter. Knowledge is vital to the commission of the offence.

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(1) [1924] A. C. 687.

(2) Ibid. 739.

While there was in this case evidence on which the jury might well have convicted the appellant, yet we cannot say that, if the evidence which was ruled out had been given, they would have done so, and we, accordingly, allowed the appeal and quashed the conviction on March 11.

Conviction quashed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*
Solicitor for Crown: *Director of Public Prosecutions.*

G. F. L. B.

1940
March 18.

MEE *v.* TOONE.

Emergency legislation—Billeting—Service of order—Complaint to tribunal—Operation of order not stayed—Defence Regulations, 1939, *reg.* 22, *paras.* (1.), (8.), (9.).

The respondent was served with a billeting notice in accordance with reg. 22 (1.) of the Defence Regulations, 1939, requiring her to board and lodge two children in her house. She failed to comply with the notice and two days later she lodged a complaint regarding it with the tribunal set up by reg. 22 (9.) :—

Held, that the lodging of the complaint did not act as a stay of the operation of the notice and the respondent was guilty of an offence under reg. 22 (8.).

CASE stated by justices.

At a court of summary jurisdiction at East Norton, Leicestershire, an information was preferred by the appellant, Superintendent William Mee, under the Defence Regulations, 1939, against the respondent, Mrs. Phyllis Toone, for that she on November 1, 1939, at Billesdon, Leicestershire, being the occupier of certain premises there, having been served by Eric Walter Armstrong, a person acting under the authority of the Minister of Health, with a written notice requiring her to furnish therein board and lodging for two children, unlawfully failed to comply with the requirements of the notice, contrary to reg. 22 of the Regulations. (1)

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(1) By reg. 22 (1.) of the Defence Regulations, 1939 (made under the Emergency Powers (Defence) Act, 1939) : "Any person acting under "the authority of the Minister of "Health or the Commissioners of "Works may serve upon the occupier of any premises a written "notice (hereinafter referred to as "'a billeting notice') requiring "the occupier of the premises to "furnish therein, while the notice "remains in force, such accommodation by way of lodging or food "or both, and either with or without attendance, as may be "specified in the notice for such "persons as may be so specified."

By reg. 22 (8.): "If any person "contravenes or fails to comply with "the requirements of a billeting "notice or with any of the requirements of this Regulation, he "shall be liable on summary conviction" to certain penalties.

By reg. 22 (9.): "For the "purpose of hearing complaints "in respect of billeting notices "there shall be tribunals constituted in accordance with such "rules as may be made by the "Minister of Health; and any "person who is aggrieved by the "service upon him of a billeting "notice, or by the operation of a "billeting notice served upon him, On the hearing of the information the following facts were admitted :—

Armstrong was a person acting under the authority of the Minister of Health. The respondent was the occupier of certain premises at Billesdon, and the wife of the driver of an omnibus which daily carried school children. On November 1, 1939, Armstrong served the respondent with a written notice under the provisions of the Defence Regulations, requiring her to receive into the premises the two children mentioned in the information and to provide them with board and lodging and to care for them to the best of her ability until relieved of the obligation. At the time of the service of the notice the two children were present and the respondent was required by Armstrong to receive them into the premises forthwith. The two children were then in quarantine, after having suffered from diphtheria. The respondent failed to furnish board and lodging forthwith as required by Armstrong. The notice advised the respondent of her right to complain to one of the tribunals provided by reg. 22 (9.) of the Regulations (1) against the service thereof if she was aggrieved by it. On November 3, 1939, the respondent made a complaint to the tribunal, but that complaint had not been heard at the time of the hearing of the information.

After the case for the appellant had been opened, but without any admission by the respondent as to any of the allegations made therein save as set out, and before any evidence was called by either party, it was submitted on behalf of the respondent that, since she was aggrieved by the service on her of the notice and had complained to the tribunal, the notice did not become operative until her complaint had been determined by the tribunal, and that, therefore, she could not be guilty of the offence charged.

On the part of the appellant, it was submitted that the notice was operative from the moment when it was served,

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"may, subject to, and in accordance with, rules made by the Minister of Health, make a complaint to a tribunal constituted under this paragraph ; and "upon hearing the complaint the tribunal may cancel or vary the billeting notice as the tribunal thinks fit."

(1) See note (1) ante, p. 638.

and that it remained operative unless and until it was cancelled or varied by the tribunal on the hearing of the complaint.

The justices were of opinion that reg. 22 (1.) of the Defence Regulations, while providing that the occupier of any premises on whom the written notice therein mentioned was served should furnish lodging and food "while the "notice remains in force," did not provide that that accommodation should be provided immediately on the service of the notice, but that para. (9.) of the same regulation conferred on a person aggrieved the right to appeal to a tribunal before he was compelled to provide the board and lodging, and that, where a person aggrieved had appealed, the notice did not operate until the appeal had been determined by the tribunal. They held, therefore, that no offence had been committed by the respondent.

The appellant appealed.

Valentine Holmes for appellant. The justices were wrong. There is nothing in the wording of the relevant paragraphs of reg. 22 to justify the interpretation being put on them that the making of a complaint under para. (9.) is to act as a stay of the operation of a notice served under para. (1.). On the contrary, the phrase "while the notice remains in "force" in para. (1.) and the power to cancel a notice given to a tribunal by para. (9.) both clearly suggest an opposite meaning.

R. T. Paget for respondent. The justices were right. Where there exists a procedure for the revision of an order or notice, whether by appeal or otherwise (here by complaint), the setting into operation of that procedure has one of two effects. If the effect of the order or notice is revocable, e.g., the payment under a judgment in a civil action of money which can be repaid, the entering of the appeal or the making of the complaint does not stay the order, but if the effect is irrevocable, as in the present case, the taking of those steps does act as a stay. Otherwise, in many cases the right to obtain revision would be useless.

HAWKE J. The Court is of opinion that this case must go back to the justices with a direction that they were wrong in holding that the billeting notice was rendered inoperative by the fact that the respondent had lodged a complaint about it with the tribunal. On the facts admitted in the case the respondent was guilty of the offence charged against her, but nothing which we shall say is intended to deprive the justices of the discretion which they possess to deal with the matter under the Probation of Offenders Act, 1907, if they think fit to do so.

It may be that these regulations show some signs of having been prepared in some haste, and perhaps that is not very surprising, but their meaning is quite clear. The billeting officer is given authority to billet persons on householders who are called on to furnish accommodation for those persons. The billeting officer is given a certain degree of discretion, because, by reg. 22 (6.), he is also given power to revoke a billeting order.

We are asked to read reg. 22 (8.) as if it were: "If "any person contravenes or fails to comply with the require-"ments of a billeting notice . . . . he shall be liable on "summary conviction" to certain penalties "unless he has "first made a complaint to the tribunal set up by reg. 22 (9.)." In my view, however, those words cannot be read into the regulation.

In drafting the regulations in the form in which they are, the Government may have found themselves bound to consider the greatest good of the greatest number. It is easy to imagine cases in which great hardship may result if a billeting notice is persisted in pending a decision of the complaints tribunal, but we have nothing to do with the merits of this case. Although hardship may occur, we think that what is being considered in the Regulations is not the good of the individual, but that of the population as a whole.

In my view, this appeal should be allowed.

CHARLES J. I agree. In my opinion, the wording of reg. 22 (9.) makes it clear that, when once a billeting notice is served, it is alive, and it remains alive until it is removed by revocation by the billeting officer under reg. 22 (6.) or by cancellation by the complaints tribunal. It is to be observed that no period is specified limiting the time within which a complaint must be made. It may not be made for some time, and when it is made the tribunal can cancel or vary what must be taken to be at that time an existing order. Reg. 22 (9.) clearly presupposes that the billeting notice is in force when it comes before the tribunal, and it in no way provides for the suspension of the operation of the notice because at some indefinite time the recipient of the notice makes a complaint to the tribunal.

The policy of these regulations is quite clear. They are regulations of emergency, and their object is to secure the safety of tens of thousands of evacuated children, although here and there hard and difficult cases may result. We are only concerned with the interpretation of the regulations and for the reasons which I have given their meaning is quite clear. I agree that this appeal must be allowed.

MACNAGHTEN J. The justices dismissed the information on the ground that the billeting notice did not operate until the respondent's complaint had been determined by the tribunal. In my opinion, that was not a valid ground for their so doing, because the notice was operative from the moment when it was served. The justices must, therefore, find the charge against the respondent proved, but I would point out that, if they are of opinion that, having regard to the extenuating circumstances in which the offence was committed, it is inexpedient to inflict any punishment on the respondent, they can, under s. 1, sub-s. 1, of the Probation of Offenders Act, 1907, dismiss the information without proceeding to conviction.

Appeal allowed.

Solicitor for appellant: *Treasury Solicitor.*

Solicitors for respondent: *Bennett, Ferris & Bennett, for Bray & Bray, Lutterworth, Leicestershire.*

G. F. L. B.

DIGBY *v.* GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED.

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Feb. 8, 9, 13.

Insurance (Motor)—Third-party liability—Policy issued by respondents to cover policyholder—Extension "to indemnify in like manner "any person whilst driving . . . . on the order or with the permission "of the policyholder"—Extended cover subject to the terms, exceptions and conditions of the policy "in so far as they can apply"—Arbitration clause—Collision—Damages recovered by policyholder against her authorized driver for personal injuries—Claim by authorized driver to be indemnified by respondents under policy—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 36, *sub-s.* 4.

By a policy of insurance the respondents agreed to indemnify the policyholder against all sums which the policyholder should become legally liable to pay in respect of any claim by any person (including passengers) for loss of life or accidental bodily injury arising out of the use of her motor-car. The policy also provided: "The insurance under this section [third-party liability] shall "also extend to indemnify in like manner any person whilst "driving . . . . on the order or with the permission of the "policyholder, ... and that such person shall, as though he "were the policyholder, observe, fulfil and be subject to the "terms, exceptions and conditions of this policy in so far as they "can apply." The policy also contained a condition that any difference arising between the policyholder and the respondents should be referred to arbitration and that "an award should be "a condition precedent to any liability of the corporation."

The policyholder, while being driven in her motor-car by the claimant, her chauffeur, was injured in a collision between her car and another vehicle, and she recovered damages against the chauffeur. In arbitration proceedings the chauffeur claimed to be indemnified under the policy in respect of those damages. The award was in his favour, but by agreement it was stated in the form of a Special Case, raising for the opinion of the Court the following questions: "(1.) Whether, on the facts and circumstances, the "claimant is entitled to avail himself of the arbitration provided "for in the policy; (2.) Whether, on the assumption that he is "so entitled to avail himself of such arbitration, the claimant is "entitled to be indemnified by the respondents":—

Held, that both questions must be answered in the affirmative, for as to (1.) it would be giving no effect whatever to the words of the policy "Such person shall, as though he were the policy-"holder, observe, fulfil and be subject to the terms, exceptions "and conditions of this policy," to hold that an authorized driver was not bound by the arbitration clause, which, moreover, made an award a condition precedent to liability; and as to (2.), the effect of the "extended insurance" clause in the policy was to promise to indemnify an authorized driver, in like manner as

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the policyholder, against all sums which he should, while driving, become legally liable to pay in respect of any claim by any person, including passengers.

SPECIAL CASE stated by umpire.

By a policy of insurance dated October 27, 1936, issued by the respondents, the General Accident, Fire and Life Assurance Corporation, Ld., it was provided that "in "consideration of the payment to the corporation of the "premium . . . . the corporation will, subject to the terms, "exceptions and conditions contained herein, and of any "endorsement hereon, indemnify the policyholder [Estelle "Merle O'Brien Thompson] in respect of any automobile "described in the Schedule against": Clause 2 ("Third "Party Liability") provided that the corporation would indemnify the policyholder against: "(1.) All sums which "the policyholder shall become legally liable to pay in respect "of any claim by any person (including passengers in the "automobile) for loss of life or accidental bodily injury or "damage to property (including animals) caused by, through, "or in connection with such automobile." By clause 2 (3.) "The insurance under this section shall also extend to indemnify "in like manner any person whilst driving any automobile "described in the schedule hereto on the order or with the "permission of the policyholder, provided there is no other "insurance subsisting under which such person may be "indemnified, and that such person shall, as though he were "the policyholder, observe, fulfil and be subject to the "terms, exceptions and conditions of this policy in so far as "they can apply." It was further provided that "the "corporation shall not be liable in respect of—(*a*) Death of "or bodily injury to any person where such death or injury "arises out of and in the course of the employment of such "person by the policyholder." By condition 8: "If any "difference shall arise between the policyholder and the "corporation, such difference shall be referred with all usual "powers to two arbitrators mutually chosen or their umpire, "or to one arbitrator if the policyholder and the corporation "shall so agree, and an award shall be a condition precedent "to any liability of the corporation or any right of action "against the corporation."

While the policy was in force, namely on March 16, 1937, the claimant, Sidney James Digby, who was employed as chauffeur by Miss Thompson, was driving her in her motor-car when a collision occurred with another car, and Miss Thompson received personal injuries. On May 4, 1938, judgment was entered in an action in the King's Bench Division in favour of Miss Thompson against Digby for 5000*l.* damages and costs agreed at 693*l.*

On October 25, 1938, the claimant began an action against the respondents claiming as an authorized driver to be indemnified under the policy against the judgment of May 4, 1938. The respondents pleaded in their defence (inter alia) that if the claimant could in law take proceedings against them under or in respect of the policy, which they denied, such proceedings could only be by way of arbitration. The action was stayed and arbitration proceedings were begun. The umpire made an award in favour of the claimant, subject to the following questions, which by agreement between the parties he stated for the opinion of the Court, being answered affirmatively: (1.) Whether on the facts and in the circumstances the claimant was entitled to avail himself of the arbitration provided in the policy; and (2.) whether, on the assumption that he was so entitled, he was entitled to recover 5693*l.*

H. U. Willink K.C. (*Montague Berryman* with him) for the respondents. Under the Road Traffic Act, 1930, defences which had previously been open to an insurance company in a suit by an authorized driver are no longer open, but that does not mean that no defence shall be open to the insurers. On the construction of this policy, clause 2 (3.) can be paraphrased in this way: "As an extension of the policy we will treat "the authorized driver as the assured, on the condition that "he is subject, as though he were the assured, to all the terms, "exceptions and conditions which bind the assured, in so "far as they can apply." As between the authorized driver and the insurance company, the conditions fall into two categories—those which apply and those which cannot apply. The arbitration condition is typical of the conditions in the latter category. Where a bill of lading contained a provision that all the terms and conditions of the charterparty should be deemed to be incorporated in the bill of lading, it was held that the bill of lading must be read as though the relevant clause in the charterparty were set out verbatim in it: *Hamilton & Co.* v. *Mackie & Sons.* (1) That principle was approved and adopted in *Thomas* v. *Portsea Steamship Co., Ld.* (2) Condition 8 in the policy which the claimant seeks to enforce only refers to differences between the policyholder and the respondents and does not cover other persons. If the authorized driver is not bound by condition 8 he is not entitled to avail himself of arbitration. By clause 2 (1.) the policyholder is agreed to be indemnified against all sums which she becomes liable to pay in respect of any claim by any person other than the parties to the contract. The expression "third party" means a person other than the two contracting parties: *Royal London Mutual Insurance Society* v. *Barrett* (3); and the words "any person" in clause 2 (1.) cannot therefore include the policyholder. The third-party insurance under clause 2 (3.) is merely an extension of the main insurance, as already defined and limited, to include authorized drivers. It is not an extension of the class of claimants against whose claims indemnity is to be given, namely, persons other than the policyholder and the insurer. A claim by Miss Thompson against herself could not come within the indemnity under clause 2 (1.), because she is not a third party, and therefore a claim by her against her authorized driver cannot come within clause 2 (3.): *General Accident, Fire and Life Assurance Corporation* v. *Watson.* (4)

H. D. Samuels K.C. (*Armstrong-Jones* with him) for the claimant. The claimant is entitled to avail himself of the arbitration clause. The respondents now say in effect that the authorized driver is in a privileged position as compared with the

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(1) (1889) 5 Times L. R. 677.

(2) [1912] A. C. 1.

(3) [1928] Ch. 411.

(4) (March 11, 1938) Unreported.

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policyholder. The arbitration clause is inserted in the policy by the respondents for their own protection, and they say that this clause, which they would insist on in the case of a claim by the policyholder, does not apply to the authorized driver. The rights of the authorized driver are given to him by s. 36 of the Road Traffic Act, 1930, and are such rights as are contained in the contract of insurance. The words "third party" in clause 2 of the policy do not mean somebody other than the insurer and the insured. It is a convenient phrase used to describe any person who makes a claim against a person insured by the policy. By s. 36 of the Act of 1930, which deals with third-party risks, a third party is any person who is caused to suffer injury by reason of the use of a vehicle on the road. If the respondent's contention is right, this policy does not comply with the Act of 1930 with regard to third-party insurance. Clause 2 of the policy is in the widest possible terms. If the respondents had intended to exclude the liability of the authorized driver to the policyholder, they would have said so in plain words. The only way to construe the words of clause 2 (3.) is: "The corporation will indemnify "the authorized driver while driving, in like manner as the "policyholder, against all sums which he may become liable "to pay to any person, including passengers." [He referred to *Dennehy* v. *Bellamy* (1); *Freshwater* v. *Western Australian Assurance Co.* (2); and *Royal London Mutual Insurance Society* v. *Barrett.* (3)]

Cur. adv. vult.

1940. Feb. 13. ATKINSON J. stated the facts, read the material clauses of the policy, and continued: Before the Road Traffic Act, 1930, the provision in a policy for extended insurance was of very doubtful value. That extended provision conferred no benefit on the policyholder, and the persons it purported to benefit, not being parties to the contract, could not claim under it. That, I think, was finally decided in *Vandepitte* v. *Preferred Accident Insurance Corporation of New York.* (4)

(1) (1938) 60 Ll. L. R. 269.
(2) [1933] 1 K. B. 515.
(3) [1928] Ch. 411.
(4) [1933] A. C. 70, 82.

In an earlier case, *Williams* v. *Baltic Insurance Association of London, Ld.* (1), Roche J. had, in that particular case and on that particular policy, found a way of giving effect to it by permitting the policyholder to recover as a trustee for a person within the extended provision, but I do not think that that case was regarded with any particular favour in *Vandepitte's* case (2), because in the Privy Council, referring to the decision of Roche J., it was said: "The facts in that case and the "contractual terms were, however, different from those in "question here and the provisions of the relevant statutes "were not the same; nor is it clear whether the learned "judge treated the driver of the car as directly insured or as "a cestui que trust. Their Lordships have not been able "to derive from that case any principles helpful to the issue "now before the Board." That, at any rate, is enough to show that the value of this extended provision to the persons intended to be benefited was very doubtful. But then came the Road Traffic Act, 1930. There are three provisions of importance which I must read. Sect. 35, sub-s. 1, provides: "Subject to the provisions of this Part of this Act, it "shall not be lawful for any person to use, or to cause or "permit any other person to use, a motor vehicle on a road "unless there is in force in relation to the user of the vehicle "by that person or that other person, as the case may be, "such a policy of insurance or such a security in respect of "third-party risks as complies with the requirements of this "Part of this Act." Sect. 36 deals with the requirements, and, by sub-s. 1 (*b*), provides that a policy of insurance must insure "such person, persons or classes of persons as may be "specified in the policy in respect of any liability which may "be incurred by him or them in respect of the death of or "bodily injury to any person caused by or arising out of "the use of the vehicle on a road." Sub-sect. 4 provides: "Notwithstanding anything in any enactment, a person "issuing a policy of insurance under this section shall be "liable to indemnify the persons or classes of persons specified "in the policy in respect of any liability which the policy

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(1) [1924] 2 K. B. 282.

(2) [1933] A. C. 70, 82.

"purports to cover in the case of those persons or classes of "persons."

The effect of s. 36, sub-s. 4, has been considered once or twice, but the most helpful case is *Guardian Assurance Company, Ld.* v. *Sutherland* (1), decided by Branson J. There a person claiming indemnity within the extended benefit clause in a policy was met by the plea that the policy was voidable on the ground that it had been obtained by the policyholder by fraud. The insurance company took proceedings for a declaration to establish their right to avoid the policy, even against an innocent claimant who was not a party to it, and they succeeded. The only part of the judgment to which I want to refer is as follows: "A policy obtained by misrepresentation of material facts "insures no one"—I agree that that must not be taken too literally, because until it is set aside I think it does—"and "therefore sub-s. 4 does not apply to a policy so obtained. "To accede to Mr. Holmes's argument would be to hold that "the Legislature had deprived an insurance company which "issues a policy under s. 36 of its common law right to repudiate "liability arising out of a policy, the granting of which has "been induced by material misrepresentation." Then the learned judge refers to several cases, reads a passage from Scrutton L.J.'s judgment in *McCormick* v. *National Motor and Accident Insurance Union, Ld.* (2), and continues: "The effect of this paragraph can only be avoided by "Mr. Holmes by saying that his action for indemnity is not "upon the contract but upon the statutory right conferred by "the section. The section does not, in my opinion, impose "any statutory liability upon the insurer. It only gives to "'persons specified' a statutory right to sue upon the contract "which, apart from statute, they did not possess." I entirely agree with that view. It means that an authorized driver claiming by virtue of s. 36 is claiming on the contract contained in the policy. Although not a party to the contract, he is given by the statute the rights of a party. He can

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(1) [1939] W. N. 122; 63 Ll. L. Rep. 220, 223, 224.

(2) (1934) 50 Times L. R. 528; 49 Ll. L. Rep. 361.

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enforce only the obligations contained in the policy, subject to the conditions therein contained.

The first question I have to decide is whether the arbitration clause applies to Digby's claim. It will be remembered that the relevant words in clause 2 (3.) of the policy are "such "person shall, as though he were the policyholder, observe, "fulfil and be subject to the terms, exceptions and conditions "of this policy in so far as they can apply." The argument for the corporation is that, even if you read clause 8 into the contract made by them with Digby by virtue of the statute, a contract which he is seeking to enforce, it still refers only to differences arising between the policyholder and the corporation, and therefore does not cover differences between a person who is not the policyholder and the corporation. Mr. Willink prays in aid the principle laid down in *Hamilton & Co.* v. *Mackie & Sons* (1), which was approved and adopted in *Thomas & Co.* v. *Portsea Steamship Company, Ld.* (2) In substance, a bill of lading contained a provision that all the terms and conditions of the charterparty were to be deemed to be incorporated in the bill of lading, and, while it was accepted that the bill of lading must be treated as if the clauses of the charterparty were set out verbatim in the bill of lading, it was held that an arbitration clause in the charterparty, providing that "all disputes under this charter "shall be referred to arbitration," did not cover any disputes under the bill of lading. Mr. Willink contends that here, if condition 8 of the policy is incorporated with clause 2 (3.) it would still be confined to a difference between the policyholder and the corporation. I do not think that any argument on those lines is open to the corporation, in view of the words in clause 2 (3.) "such person shall, as though he were the "policyholder, observe, fulfil and be subject to the terms, "exceptions and conditions of this policy." It seems to me that it would be giving no effect whatever to those words to hold that the authorized driver was not bound by the arbitration clause. In my view, also, it is extremely difficult for Mr. Willink to overcome the last line of the arbitration

(1) 5 Times L. R. 677.

(2) [1912] A. C. 1.

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clause—"and an award shall be a condition precedent to "any liability of the corporation or any right of action against "the corporation." In my judgment, a person bringing an action by virtue of the statutory provision, and bound by the terms of the contract on which he is permitted to sue, is bound by that clause and has a right to invoke its aid. I, therefore, answer the first question in the affirmative.

On the second question, it is argued for the corporation that by clause 2 (I.) of the policy, the policyholder is to be indemnified against all sums which she becomes liable to pay in respect of any claim by any person other than the parties to the contract. The expression "third party" means, it is said, a person other than the two contracting parties, and, therefore, the policyholder, if injured, could not claim indemnity under that sub-section, because she could not be a third party. Further, she could not become liable to pay damages to herself. There is one case which throws light on the meaning of the words "third party"—*Royal London Mutual Insurance Society, Ld.* v. *Barrett.* (1) In that case the insurance company had issued a policy containing the following condition: "The "policy shall be void if the life assured dies by suicide or by "the hands of justice. In any such case the directors may "allow to the policyholder such part of the sum assured as "they shall think fit, and the policy shall remain in force to "the extent of the pecuniary interest of third parties bona "fide acquired for valuable consideration, ... provided notice "thereof in writing shall have been received . . . ." The insurance company had advanced money to the assured on a mortgage of certain leasehold property, and on an assignment to them of the policy by way of security, and it was provided by a clause in the mortgage deed that the company should satisfy themselves primarily out of the policy moneys. The assured committed suicide, and the company began an action against his executrix to enforce their security. The executrix contended that the company must first satisfy themselves out of the policy moneys before they could come on the leasehold property, but it was held that the expression

(1) [1928] Ch. 411.

"third parties" did not include the company. In his judgment Tomlin J. said (1): "Now, taking the question of the "natural and primary meaning of the words, it seems to me "that the third party there is a third party by reference to "those who are concerned in the contract of assurance. In "other words, I think the phrase means a third party with "reference to the assurer and the policyholder, and possibly "the assured, because the policyholder and the assured may "conceivably be different persons. But it seems to me "that it is impossible to say there that 'third party' means "'anybody other than the assured,' or 'anybody other than "'the policyholder,' and that it therefore includes the assurer." That is a decision that in that policy—and I do not see why the principle should not apply to the policy in the present case—a "third party" means somebody other than the two contracting parties. The words, therefore, "any person" in clause 2 (1.) of this policy cannot include Miss Thompson, for the two reasons that Mr. Willink gives, first, that she could not be a third party under it, and secondly, that she could not sue herself. Then, the respondents' argument continues, the third-party insurance under clause 2 (3.) is merely an extension of the main insurance, already defined and limited —an extension to include authorized drivers—but it is not an extension of the class of claimants against whose claims indemnity is to be given, namely, the class already defined as, and limited to, persons other than the policyholder and the insurers. In effect, the insurers are saying that persons not parties to the policy would normally make claims against the policyholder, but there might be occasions on which they would claim against a person driving. Against claims by those persons, and those persons only, the corporation argues, they indemnify both the policyholder and the driver. A claim by Miss Thompson against herself could not come within the indemnity in clause 2 (1.), as she is not a third party, and, therefore, they say, a claim by Miss Thompson against Digby cannot come within clause 2 (3.).

Reliance was placed on an opinion given by Lord Robertson

(1) [1928] Ch. 414.

on a Scottish petition in *General Accident, Fire and Life Assurance Corporation, Ld.* v. *Watson.* (1) I gather that there is a procedure in Scotland by which points of law can be raised by petition, and a point exactly similar to the point in this case was raised there and was decided in the way that Mr. Willink argues this case should be decided. The words in the policy which Lord Robertson had to construe were different. There it was provided that the corporation would indemnify the policyholder against " all sums which the policyholder "shall become legally liable to pay in respect of," and so on, and then it provided: " In terms of and subject to the "limitations of and for the purposes of this section, the "corporation will indemnify any person who is driving such "motor car on the policyholder's order or with his permission." In dealing with the extended indemnity, Lord Robertson said this: " The scope of the indemnity is not expressed. "It is, however, an indemnity which is granted only ' in "' terms of and subject to the limitations of and for the "' purposes of this section.' For the ascertainment of its scope "I think that one must look back to the main part of ' this "' section.' The main part of the section provides indemnity "to the policyholder for any sums which she may become "legally liable to pay in respect of (inter alia) ' bodily injury "' to any person,' and the whole section is headed ' Liability "' to Third Parties.' I think it is plain (and it was not denied) "that if the policyholder is personally injured she cannot "directly claim indemnity under the main part of the section. "She cannot become legally liable to pay damages in respect "of injuries to herself. She is not, within the meaning of the "main part of the section, a ' person ' against whose claims "indemnity is provided. It is argued, however, that the "subsidiary part of the section provides a completely independent indemnity for Miss Peggy Watson "—the authorized driver. " That argument may be sound up to a point, but "— and I think these are very important words—" since the "scope of any such indemnity is determinable only by reference "to the main part of the section and since the policyholder

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(1) Unreported.

"herself is not a person against whose claims an indemnity is "provided by the main part of the section, I am of opinion "that the scope of Miss Peggy Watson's indemnity does not "extend to cover such claims. The contrary argument must "proceed on the view that, while the expression 'any person' "as contained in the main part of the section does not include "the policyholder, it must be construed as including her in "any question as to the scope of the indemnity provided to "Miss Peggy Watson by the subsidiary part of the section. "I reject this argument. I see no imperative reason for "changing the meaning of 'any person,' and I think that its "proper meaning in terms of the contract is controlled by "the heading of the section—'Liability to Third Parties'." It will be seen that the ratio of the decision is really contained in the words "since the scope of any such indemnity is "determinable only by reference to the main part of the "section," and it is to be observed that the words are different in the policy which I have to construe. They are: "The "insurance under this section shall also extend to indemnify "in like manner any person whilst driving any automobile . . . . "with the permission of the policyholder . . . ." The words in *General Accident, Fire and Life Assurance Corporation, Ld.* v. *Watson* (1), "In terms of and subject to the limitations of" and "for the purposes of this section the corporation will "indemnify," seem to me to be quite different. Those words plainly, I think, mean that the scope of the second insurance is to be no wider than the scope of the first.

Mr. Samuels, for the claimant, argued that the words I have to construe contemplate such an extension of the insurance as will indemnify the driver as completely as it indemnifies the policyholder. He contended that the driver can only be indemnified "in like manner" if the same language can be used of him as is used of the policyholder—namely, that he is indemnified against "all sums which he, "the driver, shall become legally liable to pay in respect of "any claims by any person (including passengers in the "automobile)." The policyholder, it is said, gets complete

(1) Unreported.

indemnity, and why is not the driver to get complete indemnity? Is he indemnified "in like manner" if he does not get complete indemnity? Further, it is argued that "third party "liability" must be construed in relation to the person liable, and that in the contract purporting to be made with an authorized driver, on which he is permitted to sue, "third "party" means some one other than the driver to whom the driver is liable in damages. Lord Robertson, in *General Accident, Fire and Life Assurance Corporation, Ld.* v. *Watson* (1), said that he saw no imperative reason for changing the meaning of the words "any person." Mr. Samuels says that you cannot avoid a change on any view and that an authorized driver must be within the definition of "any "person" in clause 2 (1.). For example, he says, supposing a friend is driving Miss Thompson, and she, suddenly startled, clutches his arm and causes him to lose control of the car and collide with something. Quite obviously he would have a claim against her. He must be within the phrase "any "person" in clause 2 (1.), and yet he could not be within the expression when incorporated in clause 2 (3.), as he could have no claim against himself.

It seems to me that Lord Robertson was right when he said that it is always to be borne in mind that the dispute is as to the meaning of the particular contract. It is easy to go astray if one is unduly swayed by the construction put on another and a different contract. I must concentrate on the language of this contract and give it its natural and primary meaning. The mere fact that it may lead to a result not contemplated by the corporation is not material. The language is the language of the corporation, and, if there are two possible constructions, equally reasonable, the one more favourable to the assured ought to be adopted. I think that Mr. Samuels is right when he says that clause 2 (3.) should be read as follows: "The insurance under this section shall also "extend to indemnify an authorized driver while driving "against all sums which he shall become legally liable to "pay in respect of any claim by any person, including

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(1) Unreported.

"passengers." I cannot see why the words "any person" in clause 3 (2.) should be given precisely the same meaning or scope as the same words in clause 2 (1.). As I have pointed out, the same meaning cannot be given. Clause 2 (1.) gives complete indemnity to the policyholder, and I cannot see why clause 2 (3.) should not give complete indemnity to the driver. Weight must be given to the words "in like manner." It is, I think, as if the corporation had said to the policyholder, "We will indemnify you against all claims which you may "become legally liable to pay," and then turning to the authorized driver, had said "And we will do the same for "you." What does that mean? It means: "We will "indemnify you against all claims which you may become "legally liable to pay." I am satisfied that the plain and natural meaning of the words is that the authorized driver is to be indemnified against all claims which he shall become legally liable to pay. The suing by an owner of her chauffeur is an unusual, and perhaps a startling, proceeding, but the same question would arise if a friend to whom a car had been lent, while driving up to the owner's gate to return the car, negligently ran into and injured the owner who was waiting to receive it. There would be nothing startling in a claim against the careless friend for damages, and I cannot see any reason why such a person should not be indemnified.

Mr. Samuels makes a further point, that the friend in such a case would be the person using the car, because the owner would not be in it, and that he would be guilty of an offence under s. 35 and s. 36 (*b*) of the Road Traffic Act, 1930, if he were not covered against claims in respect of bodily injury to any person. Miss Thompson, too, would be guilty of an offence by permitting her car to be used by a person who was not fully covered by insurance. There is no doubt that the corporation intend policyholders and authorized drivers to believe that the policy gives them at least the protection which the law requires them to have, and it may be some consolation to the corporation to know that I have been driven to the conclusion that they have used apt words to give effect to what must have been their intention. Therefore, I answer the two questions in favour of the claimant, Digby.

Award confirmed.

Solicitors for respondents: *Kenneth Brown, Baker, Baker.*
Solicitors for the claimant: *Walter, Burgis & Co.*

A. W. G.

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Jan. 23.

UNSWORTH *v.* ELDER DEMPSTER LINES, LIMITED.

Workman — Personal injury — Compensation — Proceedings against employers at common law—Ignorance of workman of rights under Workmen's Compensation Act, 1925*—Election—Receipts " without " prejudice."*

A workman sustained injuries in the course of his employment, by reason of an accident brought about by a breach of statutory duty for which his employers admitted responsibility. The workman did not know of his rights under the Workmen's Compensation Act. He only knew that if he went to his employers' office he would be likely to receive half his wages, which he called " accident money." From the date of the accident in March down to August he received this accident money week by week, and signed his name on a sheet issued by his employers which was headed " compensation." In August the workman consulted a solicitor and then learned for the first time that he had a right to choose between making a claim for compensation under the Workmen's Compensation Act and claiming damages at common law. The workman's solicitor wrote to the employers on August 15 making a claim on behalf of the workman for damages at common law. The employers replied that the workman had elected to accept compensation for his injuries under the Workmen's Compensation Act. The workman upon receiving subsequent payments from his employers in signing the sheet added after his name the words " without prejudice." In November the workman brought an action against his employers to recover damages at common law:—

Held, reversing the judgment of Croom-Johnson J., that, as the workman did not know of his rights under the Workmen's Compensation Act until he consulted his solicitor in August, he could not before that date have exercised any election as there cannot be an election without knowledge of the right to elect; that the correct inference to be drawn from the addition by the workman of the words " without prejudice " to the receipts for payments received subsequent to that date (which receipts the employers accepted without question), was that the employers agreed with the workman that the payments were made to and received by him without prejudice to his rights at common law; and, therefore, that the workman was not precluded from bringing his action at common law.

Oliver v. *Nautilus Steam Shipping Co., Ld.* [1903] 2 K. B. 639 followed.

Perkins v. *Hugh Stevenson & Sons, Ld.* [1940] 1 K. B. 56; and *Selwood* v. *Townley Coal and Fireclay Co.* [1940] 1 K. B. 180 distinguished.

Observations by MacKinnon L.J. and Goddard L.J. upon dicta in *Perkins* v. *Hugh Stevenson & Sons, Ld.*

APPEAL from a decision of Croom-Johnson J. at the Liverpool Assizes.

The plaintiff, Richard John Unsworth, who was a dock labourer, claimed damages from his employers, the Elder Dempster Lines, Ld., for personal injuries sustained by him in the course of his employment. On March 8, 1938, the plaintiff was engaged in loading the *Accra*, a vessel belonging to the Elder Dempster Lines, Ld., and was working in the lower hold of the vessel when a beam of the hatch above him, which had been left unbolted, fell upon him causing him to be injured. The plaintiff, according to his evidence, thought that he would be entitled or likely to receive half his wages if he went to his employers and claimed them. He referred to this money as "accident money." He said that all his fellow workmen when they were injured at work got it, and he therefore went to his employers' offices and asked for his accident money which he received. From week to week on receiving this accident money, which was half his wages, he signed his name on a sheet issued by Elder Dempster Lines, Ld., which was headed with the word "Compensation" and the appropriate date. The plaintiff said in evidence—and the judge accepted his evidence upon this point—that he had never heard of the Workmen's Compensation Act, and did not know the difference between his right to damages at common law and his right to compensation under the statute. In August, 1938, the plaintiff consulted his solicitors and then, for the first time, knew that he had the right to choose between making a claim for compensation and making a claim for damages at common law.

On August 15, 1938, the plaintiff's solicitors wrote to the employers making a claim for damages in respect of the plaintiff's personal injuries.

The employers' solicitors replied on August 17 repudiating any liability on the part of the employers and saying that the plaintiff was in receipt of compensation at the rate of 25*s*. 9*d*. per week.

The plaintiff's solicitors replied on August 19, and said that the circumstances in which their client met with his injuries were such as to preclude, but for any question of

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workmen's compensation, any possibility of a successful defence to an action for damages at common law, and that the circumstances in which their client accepted certain payments were such as in no way to invalidate his claim at common law.

The plaintiff, following the advice given to him by his solicitors, upon receiving the subsequent payment for the week ending August 26, in signing the sheet added after his name the words "without prejudice." He said in evidence that he was obliged to continue taking these payments as he had no other means of supporting his wife and family. The employers continued to pay the plaintiff week by week money, the plaintiff giving a receipt each week expressed to be "without prejudice."

The plaintiff, on November 18, brought an action against his employers to recover damages at common law in respect of the injuries which he had sustained.

The defendants admitted that the accident was brought about by a breach of statutory duty for which they were responsible, but they relied as a defence upon the fact that the plaintiff had elected to accept compensation for his injuries under the Workmen's Compensation Act, 1925, and that therefore under s. 29, sub-s. 1, he was not entitled to recover damages at common law.

Croom-Johnson J. held that the plaintiff had elected to receive workmen's compensation and that therefore by reason of s. 29 of the Workmen's Compensation Act, 1925, the employers were not liable to pay damages at common law.

The plaintiff appealed. The appeal was heard on January 23, 1940.

Wilfrid Clothier K.C. and *Turner-Samuels* for the appellant. The plaintiff cannot be said to have made an election because he did not know he had a right to elect. Lord Blackburn pointed out in *Kendall* v. *Hamilton* (1) that "there cannot "be election until there is knowledge of the right to elect." That was repeated by Atkin J. in *Codling* v. *John Mowlem and Co.* (2) In order that an employer may be protected under

(1) (1879) 4 App. Cas. 504, 542.

(2) [1914] 2 K. B. 61, 67.

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the second limb of s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, the workman must have made an election which prevents him receiving compensation both under and independently of the Act. This case is distinguishable from *Perkins* v. *Hugh Stevenson & Sons, Ld.* (1), and *Selwood* v. *Townley Coal and Fireclay Co.* (2) because in those cases the circumstances were held to be such as to preclude the workman from saying that he had not made an election. It is for the employers to show that the payments were made and received as compensation under the Act. There is no evidence in the present case to show that the fact that the payments were made as compensation under the Act was brought to the knowledge of the workman. Even if the plaintiff knew after August 17 that he was receiving money which his employers intended to pay as compensation under the Act, still the employers must show that the plaintiff received it as compensation under the Act or received it in such a way as to lead the employers to think that he was receiving it as compensation under the Act. The employers cannot say after the letter of August 19 that they thought that the plaintiff was electing to take compensation under the Act. It is clear from the decision in *Oliver* v. *Nautilus Steam Shipping Co., Ld.* (3) that a payment of compensation to a workman with a receipt given by the workmen "without prejudice" does not prevent the workman from suing for damages at common law. That decision was followed in *Huckle* v. *London County Council* (4), where it was held that a workman was not estopped from bringing an action at common law by the receipts he had given, as the workman alleged that he did not read them and did not understand their nature. In the present case the plaintiff signed a document headed "Compensation" which he did not read and which he signed at a time when he did not know that he had an option between receiving compensation and a right to claim damages. The decision of the learned judge ought therefore to be reversed.

(1) Ante, p. 56.

(2) Ante, p. 180.

(3) [1903] 2 K. B. 639.

(4) (1910) 26 Times L. R. 580; in C. A. 27 Times L. R. 112.

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G. J. Lynskey K.C., *Hartley Shawcross K.C.* and *C. N. Shawcross* (for *J. R. D. Crichton*, on war service) for the respondents. This case is governed by *Perkins* case (1), if the learned judge was right in holding that the payments were made and received as compensation under the Act. Although the plaintiff did not know of the Workmen's Compensation Act, he thought he was entitled to compensation for his injuries, and that the compensation would be half his weekly wages. The judge found that the payments were received by the workman under the Act. Sect. 29 of the Act provides that an employer shall not be liable to pay compensation both under the Act and apart from the Act. The workman thought he had a right to compensation, therefore he made a claim although he did not know the origin of the right. The claim was a claim made under the Act, although he did not know of the Act, and he was in fact receiving payments of compensation under the Act. The Court of Appeal held in *Bennett* v. *L. and W. Whitehead, Ld.* (2) that an unsuccessful proceeding at common law did not bar a subsequent claim for compensation under the Act. The plaintiff was told by his solicitors that he might have had a claim for damages at common law if he had not received compensation under the Act. He then decided to take money which was paid as compensation under the Act.

[GODDARD L.J. But he added the words "without prejudice" to his signature. By so doing he told his employers that he would not accept the money as compensation under the Act so as to bar his claim for damages at common law.]

This case is distinguishable from *Oliver* v. *Nautilus Steam Shipping Co., Ld.* (3), because in that case there was a special agreement between the employers' representative and the workman that he would only accept all future payments "without prejudice," and the question was whether that extended to the first payment, the receipt for which was expressed to be on account of compensation due under the Workmen's Compensation Act. Unless a workman can prove that money was paid and received under a special agreement, the words "without prejudice" will not operate to prevent the presumption that the money was paid as compensation under the Act. The authorities establish that if payments are made as compensation under the Act and received as such, they will bring into operation the second limb of s. 29, sub-s. 1. (1)

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(1) Ante, p. 56.
(2) [1926] 2 K. B. 380.
(3) [1903] 2 K. B. 639.

SLESSER L.J. This case raises once more a very difficult problem which is constantly before the Court arising out of s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925. The question which has to be considered in this class of case is in what circumstances a man, who has suffered an injury in working for his employer and has received compensation from his employer, can be said to have received such compensation under the Workmen's Compensation Act so as to preclude him from proceeding with any remedy which he might otherwise have at common law. [His lordship read s. 29, sub-s. 1, and continued:]

It has been decided in this Court in two recent cases, *Perkins* v. *Hugh Stevenson & Sons, Ld.* (2), and *Selwood* v. *Townley Coal and Fireclay Co., Ld.* (3), that where a workman has either claimed and been paid compensation under the Workmen's Compensation Act, or has accepted payments sent to him by his employers as compensation without making any claim, the employers cannot be held liable for any damages in proceedings taken by the workman at common law.

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(1) Workmen's Compensation Act, 1925, s. 29, sub-s. 1: "When the injury was caused by "the personal negligence or wilful "act of the employer or of some "person for whose act or default "the employer is responsible, "nothing in this Act shall affect "any civil liability of the em-"ployer, but in that case the "workman may, at his option, "either claim compensation under "this Act or take proceedings "independently of this Act; but "the employer shall not be liable "to pay compensation for injury "to a workman by accident arising "out of and in the course of the "employment both independently "of and also under this Act, and "shall not be liable to any pro-"ceedings independently of this "Act, except in case of such "personal negligence or wilful act "as aforesaid."

(2) Ante, p. 56.

(3) Ante, p. 180.

On the other hand it has been held in another decision of this Court, *Oliver* v. *Nautilus Steam Shipping Co., Ld.* (1), that in cases where a workman receives from his employer after injury, weekly payments which are not made by the employer as payments of compensation under the Workmen's Compensation Act, or received by the workman as such, then as the language of the statute, I think, itself makes clear, s. 29, sub-s. 1, does not operate at all. As Romer L.J. put it in *Oliver* v. *Nautilus Steam Shipping Co., Ld.* (2): "Proceedings "by a workman against his employer for compensation should "not be held to irrevocably bind the workman in the exercise "of the option given him by s. 6"—now s. 29 of the Act of 1925—"unless those proceedings have resulted in some "compensation, as such, being paid to and received by the "workman in such a manner so as to bind both parties."

The question which arises in the present case is whether it is a case of the class where the workman has been paid and has received compensation as such, bringing it within *Perkins* v. *Hugh Stevenson and Sons, Ld.* (3), and precluding him, therefore, from the right to take common law proceedings, or a case where he has not received compensation as such, and has not made his election under the Act, so that he will be free to proceed with his common law remedy.

The history of the case is to be divided into two periods. The workman was injured by an accident which is now admitted to have been the result of negligence on the part of the employers, if his right is not precluded under s. 29. [His Lordship, having stated the facts set out above, continued:] When the workman first received this money he did not know that he was receiving it as the result of some right which he had under the Workmen's Compensation Act, or whether it was paid under some arrangement which had been made between his trade union and his employers, or as an act of grace on the part of his employers. All he knew was that his friends, when they were injured, were in the habit of receiving half their wages.

(1) [1903] 2 K. B. 639.
(2) Ibid. 651.
(3) Ante, p. 56.

I pointed out to Mr. Lynskey, in the course of the argument, that it by no means follows that under the Workmen's Compensation Act the workman would be entitled to receive half his wages. That is the maximum amount fixed in the case of total incapacity. But it may be that by reason of the workman being able to do light work or for other reasons, economic or physical, his actual statutory right would be to a sum considerably less than half his wages—we do not know. In those circumstances the question arises: Did this man elect to receive workmen's compensation? Did he receive the payments as such?—to use Romer L.J.'s expression. I have no doubt at all that the employers intended to pay the money as compensation, but I can find no evidence that the workman intended to receive it as compensation under the Workmen's Compensation Act. For all he knew, he might be receiving compensation to which he was entitled at common law as a kind of compromise to paying him damages.

Such was the position until the time he consulted his solicitors and his attention was drawn to the fact that he might claim damages. As a result, the following letter was written by the solicitors to the employers on August 15, 1938:—

"Dear Sirs,

"We have been consulted by Richard John Unsworth, of "20, Southill House, Southill Road, Liverpool, with reference "to injuries sustained by him on March 8 last at about 3.30 "p.m. on board the *Accra* in West Brunswick Dock, when "the beam in No. 2 hatch gave way owing to the fact that there "was no bolt in the beam. According to our instructions, it "would appear that our client's injuries are due to the "negligence of yourselves, your servants or agents, and we "should be glad to hear by return of post that you are prepared "to admit liability in the matter, and pay our client such "damages and costs as may ultimately prove reasonable. "You will appreciate our client has an alternative claim "under the Workmen's Compensation Acts, which claim for "the moment he reserves."

I think that must refer to the right which is given under the statute by which if a man fails at common law he may have his compensation assessed under the Workmen's Compensation Act.

The answer to the letter, dated August 17, stated:

"Your letter of the 15th instant addressed to our clients, "Elder Dempster Lines, Limited, has been handed by them "to us. Our clients cannot admit that any injuries sustained "by your client was due to their negligence or that of their "servants or agents, and we accordingly repudiate liability "on their behalf. In case you are not so informed, we should "point out that your client is in receipt of compensation from "our clients at the rate of 25*s.* 9*d.* per week, the payments "having been made since March 8 last."

At that point information had been given to both solicitors of the situation. On August 19 the solicitors for the workman acknowledged the letter of August 17 from the employers' solicitors and said:

"We suggest the circumstances in which our client met "with his injuries are such as to preclude, but for any question "of workmen's compensation, any possibility of a successful "defence to an action for damages at common law. With "regard to the last paragraph, our instructions are that the "circumstances in which our client accepted certain payments "were such as in no way to invalidate his claim at common "law."

As I understand it, that is a statement from the workman's solicitors to the employers' solicitors, that the only possible defence would be by reason of the receipt of workmen's compensation, and that the circumstances in which their client had accepted the payments were such as would not invalidate his claim at common law, no doubt referring to the fact that he had not to his knowledge received the money as compensation.

Following the advice which had been given by his solicitors, the workman on the subsequent payment for the week ending August 26, added after his name the words "without prejudice." He said in his evidence that he was bound to go on receiving those payments because he had no other means of supporting his wife and family. Being pressed as to the meaning of "without prejudice" he gave what I think is a satisfactory definition when he said that he thought it meant "without bias." But the circumstances as a whole have to be considered. When the facts known to both parties are considered I entertain no doubt that the proper inference is that it was agreed by the employers with the workman, when they paid this money for the week ending August 26, that he should take that money from them without prejudice to his rights at common law. I think that is the fair result to be derived from the information contained in the letters and by the use of the words "without prejudice."

It was held in *Oliver* v. *Nautilus Steam Shipping Co., Ld.* (1), that when the words "without prejudice" were added to a receipt by a man who declined to take money from an insurance agent in respect of compensation unless he added the words "without prejudice," to which the agent assented, saying that he would make a note of it in his note-book, they were a protection to the man from its being said against him under s. 6 of the Workmen's Compensation Act, 1906, that he had made an election. Mr. Lynskey endeavoured to distinguish that case by saying that the words "without prejudice" were not so assented to by the employers in the present case as they were in that case. In my opinion, however, when the facts of the present case are considered, I think the right inference to draw is that the employers, when they paid the money and accepted without question a receipt marked "without prejudice," and continued to pay on that basis, accepted the position that the payments were to be received without prejudice to the workman's position at common law. I think, therefore, that there was here, as there was in *Oliver* v. *Nautilus Steam Shipping Co., Ld.* (1), an agreement between the parties which prevented any question of election arising on the part of the workman.

If that be the right view, it concludes this case. I think that for the first period the workman received the money not as compensation but neutrally, either as damages,

(1) [1903] 2 K. B. 639.

compensation, or as a result of some private arrangement, whatever it might have been, not knowing or understanding what he was receiving ; and that for the second period, after he was informed that it was compensation, he and his solicitors took steps between them to prevent an election taking place by the letters which were written and by the use of the phrase "without prejudice."

In the result I think that the learned judge was wrong. In particular, I disagree with him when he says in his judgment that the workman took this money knowing that it was compensation under the Act. If the learned judge meant that as a finding of fact, it is not to be derived from the evidence, which is rather the other way. I think that the money was taken as a solatium for the accident—in that sense, perhaps, as compensation—but whether as workmen's compensation under the Workmen's Compensation Act or as partial payment of damages which might or might not afterwards be taken into account in a common law action, or through some arrangement with the trade union. of which this man was a member, is all left obscure. It is for an employer who admits, prima facie, a liability for his negligence to take advantage affirmatively of the section and say that he is protected because the workman has precluded himself by the specific acts mentioned in the section. If the employer cannot prove that fact affirmatively by showing that the workmen's compensation was taken as such, and if one has to speculate as to the capacity in which the money was received, then I think that the workman is entitled to say that the employer has failed to discharge the burden which is cast on him to protect himself from the liability which he would otherwise have at common law. He must bring himself strictly within the language of s. 29, sub-s. 1, or he must fail.

For these reasons I think that the appeal succeeds.

MacKinnon L.J. I am glad to think that I can agree with the order proposed by my Lord.

I confess after listening to the many cases which have been cited to us, I find myself in very considerable difficulty as to the enunciation of any clear principles with regard to the operation of s. 29. I am in particular embarrassed by the fact that I was a party to the decision in *Perkins* v. *Hugh Stevenson and Sons, Ld.* (1), and expressed my agreement with the judgment of the Master of the Rolls in that case. At first, when I heard this case opened, it seemed to me very difficult to state any principle here which was not covered by that case. I am now satisfied that the present case is not concluded by that one, but that there is a difference on the facts, though it may appear to be a small one. Nevertheless, I think it is a real difference. In *Perkins* v. *Hugh Stevenson and Sons, Ld.* (1), the workman knew of the existence of the Workmen's Compensation Act, and that he was accepting money under it. His only ignorance was that he did not know that he had an option to make an alternative claim at common law. I think that the whole basis of the decision in *Perkins* v. *Hugh Stevenson and Sons, Ld.* (1), rested on the statement which appears at the beginning of the judgment of the Master of the Rolls (2): "He"—the plaintiff—"applied "for, and was paid as such, weekly sums by way of com-"pensation under the Workmen's Compensation Act." In this case, on the facts, Unsworth knew nothing of his rights at all, either under the Workmen's Compensation Act or at common law. All he knew, up to a date in August, was that he was receiving weekly a sum of money. On that date he was advised by his solicitors, and received, no doubt, some glimmer of illumination as to the subtle legal position which existed. Thereafter he went on receiving the weekly amounts from his employers, for he gave a receipt for them every week expressed to be "without prejudice." Here, again, one gets a very subtle distinction between these various cases. If the employers had assented to his receiving the weekly payments without prejudice, then the case would be exactly like *Oliver* v. *Nautilus Steam Shipping Co., Ld.* (3) If, on the other hand, the employers had repudiated this proposal so to receive the money, and the workman had continued to take the

(1) Ante, p. 56.
(2) Ibid. 61.
(3) [1903] 2 K. B. 639.

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money, knowing that his employers had so repudiated his attempt to keep his rights open, and the workman had given clean receipts for the money so received under the Workmen's Compensation Act, then the position would have been as in *Perkins* v. *Hugh Stevenson and Sons, Ld.* (1)

In this case it was an intermediate position. He put forward receipts saying that he received the weekly payments without prejudice—that is, without prejudice to his rights—and the employers, who must be taken to have seen those successive weekly assertions by him, said nothing at all. In those circumstances I think this case is brought on the side of the line represented by *Oliver* v. *Nautilus Steam Shipping Co., Ld.* (2), rather than on the side of the line creating the disability which occurred in *Perkins* v. *Hugh Stevenson and Sons, Ld.* (1) I realize, as I have said, that this is a very narrow ground on which to distinguish this case from *Perkins* v. *Hugh Stevenson and Sons, Ld.* (1), but unhappily one has to take narrow points in the administration of this very obscure branch of legislation. I therefore agree with the proposed order.

I would only like to add this. In *Perkins* v. *Hugh Stevenson and Sons, Ld.* (1), in addition to expressing my agreement with the judgment of the Master of the Rolls, I indicated that I felt a difficulty as to the ground on which, if the workman was allowed to go on with his action at common law, the employers could claim repayment, or take credit for the 81*l.* which they had made to him in weekly payments under the Act. On further consideration I do not think that I need have felt that difficulty. I have been assisted by some remarks made in the course of this case by Goddard L.J. I think that he is right in pointing out that, if an action at common law had been allowed to proceed, the man's damages would have had to be assessed. Part of those damages would have been his loss of wages. In so far as he had received his weekly payments from his employers, those receipts would pro tanto have diminished the amount of his damages under the head of loss of earnings. Therefore, there would be no question of

(1) Ante, p. 56.

(2) [1903] 2 K. B. 639.

claiming back that amount, or setting it off against the amount which in the hypothetical common law action he would recover, because he would only recover his loss of wages less what he had received from his employers. Therefore, so far as that additional and really unnecessary reason so put forward by me in that case is concerned, I am not at all sure that I was correct.

I agree with the proposed order.

GODDARD L.J. I agree. As we are differing from the learned judge I propose to add a few words of my own.

Taking first of all the period from the date of the accident to August 19, two questions arise. First, whether there had been an election by the plaintiff so as to debar him from bringing his action at common law; and secondly, whether the fact that he had received the payments, which the employers intended to pay him as workmen's compensation, debars him from now exercising the option which otherwise would have been open to him.

It is necessary to look carefully at the facts. When Croom-Johnson J. said that he could not see what right the plaintiff had to receive the money as anything other than that which it was, and that it was offered to him, as he knew, as workmen's compensation in respect of the accident, I do not think that that is a right inference to draw from the evidence. The evidence which the learned judge accepted shows that the workman was entirely ignorant of what his rights were. He did not know that he might be able to bring an action at common law. He says that he knew nothing about the Workmen's Compensation Act. If a man does not know of his right to elect, it is clear, on the authorities, that there is no election. Atkin J., in *Codling* v. *John Mowlem & Co., Ld.* (1), said—and his view has been since approved in the House of Lords on this point, though they differed from him on another point—that the doctrine of election in connection with s. 29 of the Workmen's Compensation Act is exactly the same as it is with regard to any other matter in

(1) [1914] 2 K. B. 61.

which election can be exercised. "There cannot be election"—said Lord Blackburn in *Kendall* v. *Hamilton* (1)—"until "there is knowledge of the right to elect." This man did not know that he had the right to elect, and, knowing nothing about it, obviously he could not, before August 19, exercise any election.

It was said by Mr. Lynskey that, as he had received payment from his employers that debarred him from bringing the action, whether he knew of his rights or whether he did not. For that proposition I think his principal authority was *Perkins* v. *Hugh Stevenson and Sons, Ld.* (2), to which both my Lords have referred, and *Selwood* v. *Townley Coal and Fireclay Co.* (3). Both those cases seem to me to be clearly distinguishable from the present case. The whole basis of *Perkins* v. *Hugh Stevenson and Sons, Ld.* (2), was that the matter had started by a claim put forward by the plaintiff for workmen's compensation. In *Selwood* v. *Townley Coal and Fireclay Co.* (3), although the workman had not made a claim, he knew about his rights under the Workmen's Compensation Act. Those cases seem to me to have no bearing on the facts of this case, which show that the workman knew nothing whatever about workmen's compensation. All that he knew was that if he met with an accident and went to the offices of his employers, he would get some money, which he called "accident money." He says that he thought he would get half his wages, but he was not necessarily entitled to half his wages under the Act, because he might not be wholly incapacitated. "Accident money" might mean, if he ever applied his mind to it, which I do not suppose for a moment he did, money payable under a contract which could be inferred by custom of the trade, or the custom of the port, or because there had been a collective bargain between the trade union and the employers. I think it is impossible in this case to say on the evidence that this man in receiving this money before August 19 was receiving it to his knowledge as compensation under the Workmen's Compensation Act.

(1) 4 App. Cas. 504, 542.
(2) Ante, p. 56.
(3) Ante, p. 180.

Slesser L.J. has called my attention to the fact that in *Selwood* v. *Townley Coal and Fireclay Co.* (1) he said: "If the "workman does not receive the money as compensation "under the Workmen's Compensation Act, different considerations arise." That is just the state of affairs which we have here. I think it is clear on these facts that quite different considerations do arise.

With regard to the payments made after August 19, when the workman signed his name on the sheet which was kept for the purpose, and added the words "without prejudice," the employers could have said: "If you are saying there "is no agreement here to pay you compensation, we are going "to stop the compensation, and we are not going to pay any "more money." Sect. 12 of the Workmen's Compensation Act, in my opinion, would not afford any difficulties at all in the way of the employers. That section, which forbids them to stop payment except as a result of arbitration, only applies where there has been an agreement, and the workman could not say that there was an agreement, because he was saying that he had never taken the money under the Workmen's Compensation Act at all. But the employers continued to pay him week after week money which he received, telling the employers that he so received it without prejudice to the rights which had already been asserted for him by his solicitor. It seems to me that this payment of money comes within *Oliver* v. *Nautilus Steam Shipping Co., Ld.* (2), which has never been questioned or overruled. If the passage in the judgment of Romer L.J., which has already been referred to by my Lord, properly states the law, I think that it is quite clear that this man saved his rights, and therefore is not barred from bringing his common law action.

I have only one more word to say. I venture respectfully to express my disagreement with that part of the judgment of the Master of the Rolls in *Perkins* v. *Hugh Stevenson and Sons, Ld.* (3), which deals with the question of set-off or recovery of sums paid. It was obiter, because it was not

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(1) Ante, p. 186.
(2) [1903] 2 K. B. 639.
(3) Ante, p. 56, 67.

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necessary for the decision of the case, but merely an expression of opinion about some difficulty which he thought might have arisen if the decision had gone the other way. As it was only obiter, I think that I am entitled to express my dissent from it. I dissent from it on the ground just stated by MacKinnon L.J. It seems to me that s. 29 is really designed, and I have no doubt its original intention was, to prevent the employer from being harassed by two legal proceedings, and to protect him against the danger of having to pay twice over, so that the workman could not, when he recovered damages for an accident caused by the personal negligence of his employer, say: "In addition, I now want my workmen's "compensation," or, if he had demanded and received workman's compensation, say: "I have demanded my "compensation; I have been paid it; and now I am going to "launch proceedings against you at common law." Where the payment has been made in circumstances in which it is held, as we are now holding, that an action at common law would lie, it is clear, I think, that the employer would not pay twice over, because, when the damages came to be assessed, the only damages which the man could recover, in addition to pain and suffering, would be what he had actually lost, which would be not the whole, but only half his wages. Therefore I think that that presents no difficulty. It is not a question either of set-off or recovery of what has been paid, but simply a matter of giving him only the damages which he has suffered.

I agree therefore that this appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Silverman & Livermore, Liverpool.*

Solicitors for respondents: *Lawrence Jones & Co., for Forwood, Williams & Co., Liverpool.*

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[1938. B. 4153.]

Market—Cattle sent to by farmer for certification and placed in pens—Steer escaping from pen and killing farmer's servant in charge of cattle—Market authority, whether liable—Livestock Industry Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 50), *Part II.—Cattle Subsidy Scheme (Approval) Order,* 1937.

A farmer sent some steers in charge of his foreman to a market of which the defendants, an urban council, were the owners and the market authority, and which was a certification centre, for the purpose of their being weighed and graded for certification under the Cattle Subsidy Scheme, 1937. On arrival at the market the steers were placed in pens which had been provided by the defendants for the convenience of owners and cattle dealers and of the certifying authority, each pen having across the front of it a chain which was detachable to admit of cattle being taken into and out of the pen. One of the steers put its head under the chain of its pen and escaped into the street, and as the foreman was endeavouring to turn it back, it knocked him down, causing him injuries of which he died the same day. In an action by his widow against the defendants for damages for their alleged negligence in failing to keep the steer in the pen:—

Held, by the Court of Appeal, that the defendants were not liable, inasmuch as the possession and control of the steer had never passed out of the hands of its owner, and the defendants by providing the pen had not accepted any responsibility for the custody of animals placed in it.

Deen v. *Davies* [1935] 2 K. B. 282; and observations of Lord Wright in *Knott* v. *London County Council* [1934] 1 K. B. 126, 140, applied.

APPEAL from the decision of Cassels J. and a special jury at Lincolnshire Assizes.

In the town of Spalding in Lincolnshire there had been from an early period a cattle market, of which at all times material to the present case the Spalding Urban District Council were the owners and the market authority.

In August, 1934, pursuant to an application under the Cattle Industry (Emergency Provisions) Act, 1934, made by the said urban council to the statutory cattle committee in that behalf, the Spalding cattle market was approved by that committee as a certification centre under that Act. That

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approval was continued under the Livestock Industry Act, 1937, Part I. of which provides for the constitution of a livestock commission, and Part II. for the making of a cattle subsidy scheme. The Cattle Subsidy Scheme, 1937, made under that Act provides (para. 1) that producers of certain classes of cattle may subject to certain conditions obtain subsidies on presenting cattle for certification at a certification centre, and (para. 5) that before approving a centre for certification the commission shall be satisfied that the centre is equipped with adequate penning and tying accommodation for cattle. For every beast taken into the Spalding market a charge of a shilling was made for reward to the market authority, of which sum sixpence was for weighing the beast and the other sixpence apparently for accommodation of the beast in the pen while waiting to be weighed.

On April 12, 1938, Mr. R. T. Proctor, a farmer and cattle breeder of Abbey Farm, Wykeham, sent twenty-one two-year-old steers to Spalding market, twenty of them to be weighed and graded for certification and one to be sold by auction, instructing his farm foreman, Mr. Frank Brackenborough (hereinafter called the "deceased") to supervise the transaction on his behalf. The cattle were taken to the market by a farm servant called Pentelow, who had only one arm, assisted by a boy called Walton, and on their arrival there about noon they were met by the deceased. As the grading was not to begin till 2 P.M. Pentelow remained in charge of them and was told to put them into two adjoining square pens. Each of these pens consisted of iron posts at the four corners, and, on each of three sides, of two horizontal chains drawn taut at heights respectively of two feet four inches and four feet from the ground, and on the remaining fourth side, forming the front of the pen, of a looser chain which was detachable so as to admit of cattle being driven into or out of the pen. One of the steers put its head under the front chain of its pen, escaped, and ran along the street, followed by the deceased and the boy. It went twice round a building and entered the yard of an inn, and when the deceased was trying to turn it back in the direction of the pen it knocked him down and caused him injuries of which he died the same afternoon. At the time of the accident the deceased was fifty-three years old, in good health, and in receipt of a wage amounting with perquisites to 3*l.* 10*s.* a week.

On September 28, 1939, Mrs. Alice Brackenborough (hereinafter called the "plaintiff"), the widow of the deceased, brought the present action against the Spalding Urban Council claiming damages in respect of the death of her husband.

In her statement of claim the plaintiff stated (inter alia) (para. 3) that it was the duty of the defendants, and their duty as holders of the market, to provide a market which was not dangerous to persons using it, or the market place or the adjoining highways, and that it was their duty to take all reasonable steps to provide a market which was in all respects free from dangers of which they knew or ought to have known; and that it further was a duty of the defendants to take all reasonable precautions to prevent cattle from escaping in the market place or causing damage to persons or property on or adjoining the highway; (para. 4) that the defendants had committed breaches of all these duties, the particulars being that some of the cattle-pens provided by the defendants in the market were defective and dangerous in that the sides thereof consisting of chains were slack and not securely fastened, and inadequate for the purpose of preventing the escape of cattle placed therein, and that the pens were so situated that cattle placed therein were liable to be disturbed or frightened by persons or traffic moving close to them; (para. 5) that by reason of the matters hereinbefore set out the pens and the cattle therein were a nuisance to persons using the market and the highway; (para. 6) that the deceased brought the above-mentioned steers to the market, and that they were by direction of the defendants placed in two of the said pens, and that the defendants collected toll in respect of them, and that these pens were defective and a nuisance as aforesaid; (para. 7) that in consequence of the matters complained of, one of the steers escaped, and whilst the deceased was endeavouring to drive it back to the pen he was knocked down by it and received injuries which caused his death; and (para. 8) that by reason thereof the plaintiff suffered loss and damage. And that she claimed in respect of the death of the deceased by the negligence of the defendants: special damages; damages under the Fatal Accidents Acts, 1846 to 1908, for herself and her infant son; and, as personal representative of the deceased, damages under the Law Reform (Miscellaneous Provisions) Act, 1934.

The defendants denied the above allegations of the plaintiff against them.

The action was tried on June 12 and 13, 1939. At the conclusion of the plaintiff's case it was submitted on behalf of the defendants that they had no case to answer, but the judge refused to withdraw the action from the jury and the defendants' case was also heard. The learned judge having summed up, the jury returned a verdict for the plaintiff as follows: Special damages, 15*l.*; damages under the Fatal Accidents Acts, 1250*l.* for the plaintiff, and 250*l.* for her infant son; and damages under the Law Reform (Miscellaneous Provisions) Act, 1934, for the deceased's pain and suffering and loss of expectation of life, 500*l.*

The judge gave judgment for the plaintiff for 1265*l.* 16*s.* 6*d.* to be paid or dealt with as follows—namely, 500*l.* to the plaintiff under the Law Reform (Miscellaneous Provisions) Act, 1934; 23*l.* 16*s.* 6*d.* to the plaintiff for special damage; and 742*l.* to be paid into Court and invested as to 250*l.* for the benefit of the infant son of the deceased, and as to the balance for the benefit of the plaintiff.

The defendants appealed to the Court of Appeal. The appeal was heard on January 24, 25, 1940.

The plaintiff cross-appealed as to damages.

H. J. Wallington K.C. and *Geoffrey Smallwood* for the defendants, appellants.

The learned judge was wrong in holding that the defendants were responsible for the death of the deceased. At the conclusion of the plaintiff's case he should have withdrawn the action from the jury on the ground that no liability had been established on the part of the defendants. The arrangement to send these cattle to the market to be weighed and graded was made between Mr. Porter, their owner, and the certifying authority, and the defendants had no concern with it or its consequences. The defendants take no part in the weighing and grading of beasts, which are to be sold privately, except to provide facilities and to make a charge for the use of the weighbridge. The judge wrongly assumed that the fact that the pen belonged to the defendants created a liability in them to see that the beasts did not escape. The defendants put the pens in the market for the convenience of the certifying authority and the dealers in order that the cattle may be kept there until their turn comes for weighing and grading. It was not the duty of the defendants, but of the certifying authority, to see that the pens were so constructed as to be reasonably effective in preventing the escape of cattle. The pen in which the escaped steer was placed was reasonably safe, but, even if it was not, the defendants can be under no liability as it had been approved by the certifying authority. It is the certifying authority and not the defendants who order the cattle to be put in the pens. The fact that the defendants received a toll of a shilling a head for each animal does not render them liable. That payment was made to them for weighing only, and they have no right to charge a toll for the private grading and certifying of cattle, such as this was. No act or default of the defendants was the cause of the deceased's death. The deceased was a farm foreman skilled in managing and controlling cattle. As he failed to keep the escaped steer in its pen, he was guilty of contributory negligence conducing to the accident, and the judge omitted to point this out to the jury. As the deceased chose not to restrain the animal the principle volenti non fit injuria applies.

P. E. Sandlands K.C. and *M. Dunbar Van Oss* for the plaintiff, respondent.

The judge and jury rightly decided that the defendants were liable to the plaintiff. The defendants, as proprietors of the market, having invited the owner of the escaped steer to bring it to the market for weighing and grading, and having

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received a toll in respect of it, was under a duty to members of the public frequenting the market to take reasonable care to keep the market in a safe condition, and in particular to provide a secure pen for the animal, and is liable to the plaintiff for the injury caused to her by their breach of that duty: *Lax* v. *Darlington Corporation.* (1) The defendants by erecting these pens on the highway where the market is held, were bound to take care that they would not cause injury to members of the public using the highway: *Penny* v. *Wimbledon Urban District Council* (2); *Holliday* v. *National Telephone Co.* (3); *Clark* v. *Chambers* (4); and Beven on Negligence, 4th ed., p. 536. By erecting these insecure pens on the market, which they owned and controlled, the defendants were liable for the consequences of cattle escaping from them, in accordance with the principle of *Rylands* v. *Fletcher.* (5) These pens were only safe for persons frequenting the market or the highway when there were no cattle in them. If the part of the street on which the defendants constructed this pen from which cattle were liable to escape was not owned and controlled by the defendants as market authority, then they caused a nuisance by placing an obstruction on the highway. A person who brings an animal on or near to the highway must take reasonable care to prevent it from doing damage to persons thereon: *Deen* v. *Davies.* (6) And equally a person who by erecting pens on or near the highway invites others to put animals therein is under a similar duty. That duty is no doubt qualified in the case of the owner of a market on a highway to this extent that he is not liable for an obstruction caused by what is properly done in exercise of the market franchise, but he is not excused from exercising reasonable care that the obstruction is not dangerous. A person who brings or invites others to bring cattle on to a highway, whether he has a market or not, must take reasonable care that the cattle do not escape. On the issue of fact whether this pen was reasonably sufficient to prevent the

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(1) (1879) 5 Ex. D. 28.
(2) [1899] 2 Q. B. 72.
(3) [1899] 2 Q. B. 392.
(4) (1878) 3 Q. B. D. 327, 338.
(5) (1868) L. R. 3 H. L. 330.
(6) [1935] 2 K. B. 282.

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escape of cattle placed in it, the jury, after being amply directed by the judge, returned a verdict that it was unsafe and that finding should not be disturbed. The deceased was not guilty of contributory negligence.

[SLESSER L.J. The Court does not require to hear argument on that point.]

Wallington K.C. was not called upon to reply.

SLESSER L.J. By the provisions of the Livestock Industry Act, 1937, it is possible for producers of certain classes of cattle to obtain subsidies under the conditions set forth in the Cattle Subsidy Scheme made under that Act, which provides that every producer who desires to claim the subsidies must present the cattle in respect of which he claims for certification at a certification centre.

It appears that as early as August 29, 1934, in order to comply with the earlier Act, the Cattle Industry (Emergency Provisions) Act, 1934, the Spalding Urban District Council applied to the cattle committee appointed under the Act for the approval of Spalding market as a certification centre in accordance with the then existing regulations. That approval was given and has been continued under the Act of 1937. It therefore appears that Spalding market is a certification centre within the meaning of the Act of 1937. The Scheme requires that, for the purpose of certification, the place where the animals are to be examined shall be equipped with adequate penning accommodation (para. 5).

[His Lordship stated the facts and continued :]

The plaintiff sued the defendants as the urban authority and as owners of the market claiming damages for herself and her son under Lord Campbell's Act and also under the Law Reform (Miscellaneous Provisions) Act, 1934, as administratrix of the deceased man for his loss of expectation of life. The plaintiff alleged negligence and that it was the duty of the defendants as holders of the market or as highway authority to provide a market which was not dangerous to persons using it or frequenting the market place or the adjoining highways. She further alleged that it was the defendant's duty to take all reasonable precautions to prevent cattle escaping in the market place and causing danger to persons or property on the highway. She then alleged that the defendants had failed in their duty in that some of the pens provided by the defendants were defective and dangerous in that the sides thereof, consisting of chains, were slack or were not securely fastened or were inadequate for preventing the escape of cattle placed therein. Her case was put alternatively in nuisance.

At the trial it was submitted that on the facts as proved the council had been negligent in that they failed to take proper precautions to restrain these cattle which they had invited to be placed in one of their pens. As I understand it, this submission was made on the basis that the deceased foreman was to be regarded as being, like any other member of the public, entitled to be protected from the negligence of the defendants. No point was made of the fact that the farmer paid a shilling for the weighing of the animals, or sixpence for the weighing and sixpence for the use of the pen, but it was said that the deceased man had been injured as a member of the public. There was little dispute as to the facts, and at the end of the plaintiff's case a submission was made on behalf of the defendants that there was no case to answer and that the case should be withdrawn from the jury. The judge, however, declined to withdraw the case from the jury and after further evidence had been given he summed up. In the result the jury found for the plaintiff and awarded her substantial damages both under Lord Campbell's Act and under the Law Reform (Miscellaneous Provisions) Act, 1934.

Mr. Wallington now contends that as a matter of law the judge was wrong in leaving the case to the jury because on the facts there was no duty on the part of the defendants which could make them responsible.

In the first place it is to be observed, on the facts of this case, that the control and possession of these animals had never passed out of the hands of the farmer. They were his beasts and he, by his men, had brought them into the market and put them in the pen. The animals were at all times under his control. Primarily, therefore, if they escaped and did damage he would be the person liable to any one who was injured thereby, as in *Deen* v. *Davies* (1), where a man who had brought a pony into a town and tied it up in a stable adjoining a street without taking proper steps to prevent it from straying into the street was held liable for the conduct of the animal in causing damage to a person lawfully using the highway.

But it is said that in the present case there was a liability on the part of the defendants in that they, as the market authority, invited the farmer to place his beasts in this pen for reward, and that, having undertaken the obligation to provide him with that for which he was willing to pay, they were under an obligation, not only to him, but to the whole world, to see that the pen was safe.

I think that some guidance can be found in the decision in *Knott* v. *London County Council.* (2) In that case a charwoman employed as a cleaner at a school owned by the defendant council was bitten by a dog belonging to the school-keeper, who lived on the school premises and was permitted by the defendants to keep the dog. The school-keeper knew that the dog was prone to attack mankind, and part of the case turned on the question how far his knowledge could be imputed to the defendant council. But there are observations by Lord Wright which suggest that what must be looked at primarily in such a case is the question of possession and control. He said (3): "It is true that the real test of responsibility "is not ownership but possession and control; hence in "*M'Kone* v. *Wood* (4), Lord Tenterden in ruling before the "jury put as the test whether the defendant was 'harbouring "'the dog.' The ruling was a ruling at nisi prius and the "facts of the case are not very fully or precisely stated, but "I understand Lord Tenterden was ruling on a case where a "dog was allowed, with the defendant's knowledge, to live "on his premises, where it had been left by a former servant "on his going away. In such a case it might well be found "in fact that there was possession and control in the occupier,

(1) [1935] 2 K. B. 282.
(2) [1934] 1 K. B. 126.
(3) [1934] 1 K. B. 126, 140.
(4) (1831) 5 C. & P. 1, 2.

"there being no one else on the premises to exercise control "or claim possession." Lord Wright also referred to *North* v. *Wood* (1), in which a vicious dog was owned by a man's daughter, who lived with her father. The daughter paid for its food and the licence, and was of sufficient age to control the dog, and the man was held not liable for damage done by the dog although he knew it to be savage, because it was under the daughter's control.

In the present case I can see no reason to suppose that the defendants in any way were in possession of or accepted any responsibility for or exercised any control over these beasts. The farmer brought them into the place which had been approved by the competent authority as a certification centre. The defendant council undoubtedly had the ordinary privilege of market and, this being market day, in allowing these animals to be brought there they were immune from any complaint on the ground of nuisance for allowing a concourse to be formed on the highway. They had also provided pens for the reception of the animals, but I cannot see that they were any more liable for one of the beasts getting loose and running away than they would have been if they had not provided any pens at all. It was not the pen as such which caused the beast to run away. It was the fact of the beast finding itself in a town in unusual surroundings instead of enjoying the freedom of the fields.

I find it difficult to understand on what principle this case can be put. I do not think that the cases quoted to us, which lay down that where a person has an obligation to the public he cannot relieve himself of responsibility by handing over that obligation to a sub-contractor, have anything to do with the present case. Here the farmer retained possession and control of his beasts and brought them to a place—whether a market or a certification centre matters not—where the defendants were entitled to allow them to assemble without their constituting a nuisance. Having done that, the defendants had no more control over the beasts than had the London County Council in *Knott* v. *London County Council* (2), over the dog when they permitted it to be kept on school premises. In other words the mere permission given by the defendant council for the animals to be put in their market did not, in my opinion, make them responsible if the animals escaped. To quote once more from the judgment of Lord Wright in *Knott* v. *London County Council* (1): " The respondents were "not concerned with the dog and had neither property in "nor possession of it and made no use of it."

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(1) [1914] 1 K. B. 629. (2) [1934] 1 K. B. 126, 142.

I will only add one thing more. It seems to me a matter of indifference whether the animals, when they are in the pen, are to be regarded as being in a market or a certification centre. In either case the defendant council only permitted the pen to be used by the farmer. They had no possession or control of the animals. I have assumed that the jury were entitled to find that the pen was dangerous or insecure, although how they arrived at such a conclusion I do not know. But in my opinion it is immaterial, because there was no legal duty on the defendants to keep the animals in the pen.

MACKINNON L.J. I agree. The plaintiff desires to get compensation for her husband's death. What was her cause of action ? I think she has one only, which is illustrated by *Deen* v. *Davies*. (2) In that case the headnote in the Law Reports states : " The owner is liable for the conduct of the "animal if he puts it in a position in which it is likely to "cause damage to persons lawfully using the highway." A more exact statement would be that the person responsible is he who has the custody and control of the animal, who in most cases would be the owner.

In the present case the plaintiff sued the defendants as owners of a market alleging that it was their duty to provide a market which was not dangerous to persons frequenting the same, and to take all reasonable steps to prevent cattle escaping and causing danger to persons or property on the highway. In order to succeed against the defendants, the plaintiff must show that they had taken over the custody and control of the animal concerned after it had arrived at

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(1) [1934] 1 K. B. 126, 142. (2) [1935] 2 K. B. 282.

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the market place. There is no evidence of that. The defendants provided a pen where animals might be placed by their owners for a time, but it is obvious on the facts of this case that, as between the defendants and the owner, they never agreed to assume the custody and control of the animals. It remained the duty of the owner to continue to exercise control over the beasts.

I suggested in the course of the argument a parallel case. Many local authorities provide parking places for cars and charge a fee. Suppose that a parking place was on a slope, and that a car was left there insecurely braked and as a result ran down the slope and injured a passer-by on the highway. If the victim of that accident sued the local authority alleging that it was their duty to take reasonable care to make the parking place safe and to prevent cars from running away, I think it is fairly obvious that the plaintiff would fail. In principle I can see little difference between such a case and the present.

I will add one observation. I have spoken of the deceased man as if he were an ordinary member of the public. In fact, he was in charge of the cattle, but that special position could not give him any greater right than if he had been an ordinary member of the public. If it had any effect, it might have been to give him a diminished right, because it might be said that he failed to exercise due diligence in keeping the animals under control.

I think that the plaintiff has failed to establish any breach of duty on the part of the defendants, and that the appeal should accordingly be allowed and the cross-appeal dismissed.

Goddard L.J. I agree and have nothing to add.

Appeal allowed.
Cross-appeal dismissed.

Solicitors for appellants: *J. D. Langton & Passmore, for Mellows & Sons, Peterborough.*

Solicitors for respondent: *Lee, Bolton & Lee, for Edmund W. Roythorne, Spalding.*

J. R.

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[1938. M. No. 3621.]

Animals—Camel kept in a zoological garden—Visitor bitten by camel while feeding it—Liability of proprietor of garden—Camel, whether wild or tame animal—Scienter.
Judicial notice—Of fact—Evidence to assist judge.

The camel is a domestic and not a wild animal in England.

The defendant was the proprietor of a zoological garden near London, where a camel enclosure, fenced in by wire netting about six feet high, contained an Arabian camel. The plaintiff, who was lawfully in the garden as a visitor, after having had lunch there, fed the camel with three apples, and as he was giving it a fourth it caught his hand in its teeth, biting and crushing it severely. In an action by the plaintiff against the defendant for damages for personal injuries the plaintiff called witnesses who stated that the camel was an animal of uncertain temper and liable to bite human beings; but the defendant called two witnesses having great experience and expert knowledge of camels, who stated that the camel had no natural tendency to bite human beings, and that camels did not exist anywhere in the world as wild animals, but only under the control and in the service of man. There was no evidence that the defendant knew that the camel which bit the plaintiff had previously bitten any one or was otherwise dangerous:—

Held, by the Court of Appeal, on the facts, of which the Court, assisted by the evidence, was entitled to take judicial notice, that the camel is not a wild animal in any part of the world, and that a camel is a domestic animal; and, as there was no evidence that the defendant had any knowledge that the camel in question had previously shown any vicious propensity, that the defendant was not liable for the plaintiff's injuries.

Filburn v. *People's Palace and Aquarium Co., Ld.* (1890) 25 Q. B. D. 258, 261, observations applied.

Distinction between the use of evidence for the purpose of proving a fact, and its use for the purpose of assisting a judge in forming a clear view of a fact of which he is entitled to take judicial notice, explained by Clauson L.J.

Appeal from the judgment of Branson J. at Kingston Assizes, Surrey.

Mr. R. S. Goddard (hereinafter called "the defendant") was the proprietor of the Chessington Zoological Garden at Surbiton, in Surrey, to which the public were admitted and had access. At the garden a piece of ground, fenced in

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by wire netting about six feet high, was used as a camel enclosure, inside of which there was an Arabian camel.

On August 3, 1938, Mr. Robert McQuaker (hereinafter called "the plaintiff") visited the garden, accompanied by a lady. They sat on the lawn next to the camel enclosure, and there partook of a picnic lunch which they had brought with them. Some children with their mothers were also picnicking on the same lawn. After they had had their lunch the children gave pieces of lettuce or other food to the camel, which ate them without doing any harm. The plaintiff then proceeded to give the camel apples, and, after he had given it three and was offering it a fourth, the camel, instead of taking the apple from his hand, caught hold of his hand, biting and crushing it seriously.

On August 4, 1938, the defendant caused a notice to be put up at the camel enclosure stating that camels bite and that visitors should not feed them by hand.

On November 12, 1938, the plaintiff brought the present action against the defendant, claiming damages for personal injuries caused to him by the defendant's camel.

The plaintiff stated in his amended statement of claim (para. 3) that he suffered as aforesaid by reason of the negligence of the defendant, his servants or agents, the particulars being that the defendant was negligent in that he—(*a*) kept an animal feræ naturæ without taking any or any adequate steps to protect the public therefrom; (*b*) failed to warn the public that camels are dangerous to mankind; (*c*) knowing that it is a habit of visitors to a zoo to pet and feed animals therein, unless specifically warned not to do so, failed to give any such warning; (*d*) failed to enclose or properly enclose the said camel so that it could not reach over the top of the fence or be approached by visitors; (*e*) failed to have any or any proper supervision at the said zoo generally and the camel enclosure in particular; and (para. 4) that further or alternatively the defendant kept at his premises the said camel, an animal feræ naturæ, which attacked and injured the plaintiff whilst lawfully on the said premises.

The defendant stated in his amended defence: (para. 2) that he denied that he or any servant or agent of his was guilty of the negligence alleged, or any of it; (para. 3) that the injuries and/or damage sustained by the plaintiff (if any) were caused, or alternatively, were contributed to, by his own negligence in feeding the camel and in keeping no proper look out, and/or taking no proper precautions for his own safety whilst so doing; and (para. 4) that, alternatively, in placing himself in close proximity to the said camel and in feeding it, the plaintiff voluntarily took the risk of being bitten.

The plaintiff, in giving evidence, alleged that he was lifted off the ground by the camel and shaken. He called three witnesses to prove that all camels are of uncertain temper and have a natural tendency to bite. The defendant called two witnesses, Captain Cross and Mr. Styles, having great experience of camels, who stated that camels are as free from vice as many domestic animals, and that the idea that they have a tendency to bite human beings is not true; and these witnesses also stated that camels did not exist anywhere as wild animals, but only in the service of man. The nature of the evidence given by all these witnesses appears from the references made to it in the judgments of Branson J., and of the Court of Appeal as set out below.

On July 6, 1939, the action came on for trial before Branson J. and a common jury. The learned judge, after hearing the evidence, decided that there was no case to go to the jury, withdrew the case from them, and gave judgment as follows:—

Branson J. In this case the plaintiff sues the defendant for damages for personal injuries caused to the plaintiff by the defendant's camel. [His Lordship stated the facts as above set out, and continued:] The position at law is, I think, made perfectly plain by the case which has been cited of *Filburn* v. *People's Palace and Aquarium Co., Ld.* (1) In that case the plaintiff was suing for damages for personal injuries which had been caused to him by an elephant, and

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(1) (1890) 25 Q. B. D. 258.

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the Court there laid down a formula for classifying the sort of animal which a man always keeps at his peril, and the sort of animal with regard to which a man is not made liable for damage done by it unless there is evidence to show that in the case of that particular animal a vicious propensity has been disclosed. [His Lordship read from the judgment of Bowen L.J. in that case the passage which is quoted in the judgment of MacKinnon L.J. as set out below, and continued :] In this case I have heard evidence with regard to camels, and whereas several witnesses called for the plaintiff have told me that camels as a class are dangerous, treacherous, and vindictive animals, which are not to be trusted, I have heard, on the other hand, the evidence of Captain Cross and Mr. Styles, both of whom have great experience of camels, and it seems to me to be beyond question that the camel must fall within the class of animals which are called domesticated. Captain Cross explained that there is no such thing as a wild camel, but that, on the contrary, the camel is the oldest domesticated animal that we have, and that it is so domesticated that it cannot copulate without the assistance of man ; and, indeed, the witnesses for the plaintiff, or, at any rate, Mr. Woollworth, agreed that he had never heard of a wild camel. It seems to me that that evidence brings the camel clearly and plainly within the class of domesticated animal. In order to recover against the owner of an animal of that class for damage done by the animal, the plaintiff must show by evidence that the owner had reason to believe that the particular animal was a dangerous animal because of its particularly bad temper, or its tendency to bite, or some other viciousness, which rendered it unsafe to deal with in the way in which an animal of that class can usually be dealt with. There is here no evidence, and it is not suggested that there is any, which would entitle the plaintiff to succeed if this animal falls within the class which persons may safely keep unless they know that the particular animal is likely to do mischief. Therefore I must enter judgment for the defendant.

is this true or
rather,
obstinate?

Judgment for defendant.

The plaintiff gave notice of appeal on the grounds that the judge was wrong in holding (1.) that there was no case to go to the jury, and (2.) that the camel is a domestic animal, and that the doctrine of scienter applied. The appeal was heard on February 7, 8, 1940.

Harold Brown for the plaintiff, appellant. The learned trial judge was wrong in holding that the camel is a domestic animal and that it was necessary for the plaintiff to prove scienter. The evidence taken as a whole shows that the camel has dangerous qualities by reason of which it should be included in the class of wild and not in the class of tame animals. Though it may be regarded as a domesticated animal, and may even be such by law, in countries in which it is native and in some other countries : see *Nada Shah* v. *Sleeman* (1), there is no evidence to show that it has ever been so regarded in England, and a camel in England must be a wild animal by English law. The defendant therefore kept this camel at his peril and is liable to the plaintiff for the injury which it caused to him : *May* v. *Burdett* (2) ; and *Filburn* v. *People's Palace and Aquarium Co., Ld.* (3) As the camel does not belong to the class of tame or domestic animals it is not necessary for the plaintiff to prove scienter in respect of this particular camel.

[Scott L.J. referred to *Osborne* v. *Chocqueel.* (4)]

It is submitted that, besides the two classes of wild and tame animals, there is a third class consisting of animals which, though not wild but under the control and used in the service of man, nevertheless retain certain savage propensities to bite and otherwise injure mankind ; and that the evidence shows that the camel belongs to that third class. If that be so, then the defendant as the owner and manager of camels, must have known that his camel had these vicious propensities and should have kept it from reaching the plaintiff. Apart from the question whether the camel is a

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(1) (1917) 19 Western Australian L. R. 119.

(2) (1846) 9 Q. B. 101.

(3) 25 Q. B. D. 258.

(4) [1896] 2 Q. B. 109.

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wild or a tame animal, the defendant is liable on the ground that he was guilty of negligence in inviting the public to come and see this camel while the enclosure in which it was kept was too flimsy and insufficiently high to prevent the camel from reaching visitors on the lawn, and by putting up a warning notice the day after the accident he admitted his negligence: see *Aldham* v. *United Dairies* (*London*), *Ld.* (1)

Eric Neve K.C. and *A. A. Pereira* for the defendant, respondent. The judgment of the learned judge was correct. The question whether or not the camel is a domestic animal in England was a question of fact to be decided on the evidence given at the trial. The trial Court answered that question in the affirmative, and, as there was some evidence to support that finding, it cannot be disturbed. Not only did the defendant call some evidence to support that view, but the evidence which he called was overwhelming. The case of *Filburn* v. *People's Palace and Aquarium Co., Ld.* (2) is distinguishable from the present case because in that case there was no evidence to show that the elephant is a domestic animal in England. The camel being a domestic animal, the plaintiff cannot succeed in this action unless he can prove that the defendant knew that this camel had bitten, or was liable to bite, a human being, but of that he produced no evidence. By English law every animal comes within either the class of wild animals or the class of tame or domestic animals, and there is no intermediate class such as the plaintiff seeks to create of animals which, though controlled and used by man, nevertheless retain certain savage propensities which must be known to their keepers. If there be such a third class of animals and if the camel comes within it, there is no evidence that the defendant knew that the camel has these propensities. There was no negligence on the part of the defendant. The fence round the camel enclosure was sufficiently strong and high for its purpose, and the plaintiff would not have been bitten unless he had put his hand over the fence. The defendant by putting up the notice made no admission of negligence.

(1) Ante, p. 507.

(2) 25 Q. B. D. 258.

SCOTT L.J. This case has been very well argued by Mr. Harold Brown for the appellant, and is a case of general interest. It is also one in which this Court joins with the learned judge in the Court below in expressing sympathy for the plaintiff, in that, as the law stands, he is not entitled to any remedy in respect of the serious injuries which he received. In expressing that sympathy, I, however, do not desire to imply any sort of blame against the defendant, who was the owner of a zoological garden where the camel was kept which bit the plaintiff's hand.

[His Lordship stated the facts of the case as above set out, and continued :] The plaintiff himself thinks that he was lifted off the ground by the camel and shaken. I express no opinion about that, because it is quite clear that the injury done to the plaintiff's hand was very serious ; and it may be that his recollection of those incidents is not strictly accurate.

The plaintiff subsequently brought an action against the defendant to recover damages for the injury he had suffered.

He put his case in his amended statement of claim mainly on two alternative grounds : (1.) the usual form of action against the owner or keeper of an animal, where the plaintiff succeeds in showing that a propensity to bite or otherwise attack mankind was known to the defendant ; (2.) on the ground that the camel is a wild animal, at any rate in England, and that English law holds the owner or keeper of a wild animal with a disposition to attack mankind as under a duty to prevent that animal attacking anybody, an absolute duty the breach of which results in a liability in damages, without any proof of knowledge of the propensity on the part of the animal, and without any proof of negligence.

Another ground put forward in the statement of claim was, that even if a camel is properly to be regarded as a domestic animal in respect of which knowledge of a propensity to bite or injure mankind is essential, and although the plaintiff could not establish the scienter, that is to say, prove the defendant's knowledge of such propensity in this camel, yet on the facts of the case, the defendant was guilty of negligence, in that the fence was not sufficiently high or solid to prevent the camel from putting his head over it, and pressing down the wire so as to be able to reach people who were standing on the lawn.

Those issues raised by the statement of claim were met by traverses on the part of the defendant, who raised a further point, namely, that the plaintiff took the risk voluntarily upon himself. That point we can disregard, as we have heard nothing of it in this Court.

Shortly, those are the facts, and I think all the facts, that are material to the issues which arose between the parties. The plaintiff called witnesses to prove that all camels have a tendency to bite, that is to say, that they are treacherous and may at any time bite, but it was not very strong evidence. It was certainly not so strong as the evidence of the two witnesses called on behalf of the defendant. One of these was a man who had had experience extending over many years in dealing with camels as transport animals, and he spoke to their being obviously domestic animals, just as free from vice as many animals of the domestic kind in England, such as bulls, stallions, or dogs. But the chief witness called for the defendant was a man who had been a keeper of camels at the Zoological Gardens in Regent's Park, London, for a great number of years. He spoke to the nature of camels as he got to know them there, and no doubt with other expert knowledge about them; and he said that the idea that camels have a natural tendency to bite human beings is not true. He proved, among other things, that at the Zoological Gardens the camels are kept within iron railings, which, it is true, are six feet high, but which are six inches apart, so that it is quite easy for people to put their hands through and to feed the camels; and that he had never known of a case of biting.

Broadly, those are the results of the evidence on the two sides, with one qualification. It was quite clearly established by the defendant's witnesses in my view that camels do not exist anywhere in the world to-day as wild animals. There is no race of wild camels which could be captured and tamed like elephants. Wild elephants do exist both in Asia and in Africa, in great numbers. Though they can be tamed, and can be taught to be extremely clever, as for instance, in the teak forests of Burmah and in India, they are apt to be savage, and to attack human beings in certain circumstances. But nowhere in the world are camels wild. In every country where they exist they are domestic animals used for carrying either people or loads on their backs, or for draught purposes. Those are the facts relating to the species camel.

There was no evidence given in this case that the defendant had any knowledge that this camel was vicious; nor, indeed, was there any evidence to the effect that this camel was vicious as distinct from camels as a class. Nor was there any evidence that the defendant had any knowledge of such propensity of camels as a class to bite, as was alleged by the plaintiff's witnesses. If the evidence of the camel-keeper from the Zoo and of the other witness called for the defendant is to be accepted, that propensity to bite was much exaggerated by the plaintiff's witnesses; and it is plain that the plaintiff's witnesses had not nearly the same experience or means of knowledge, to constitute them valuable expert witnesses about camels, as the defendant's witnesses had.

On the question of law, it is important to bear in mind that, in the common law of England, a rule was laid down long ago that domestic animals are to be regarded in quite a different light from wild animals. Wild animals are assumed to be dangerous to human beings because they have not been domesticated. Domestic animals are assumed not to be dangerous. That is why, in English law, the keeper of a wild animal must keep it in at his peril: so that if he lets it out and it causes injury to the person or property of any human being, the keeper or owner of the animal, as the case may be, is liable in damages for the injury so caused; and why in the case of domestic animals, the presumption of law is to the opposite effect. There the plaintiff has to prove that the defendant was aware of the particular propensity to hurt human beings which was evinced in the case where, ex hypothesi, the plaintiff suffered; unless he proves that knowledge, there is at common law no liability upon the defendant. That liability has, in the case of dogs worrying

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sheep and certain other animals, been altered by legislation. (1) But, apart from that exceptional statutory case, there is no liability without proof of knowledge of the defendant; the scienter, as it is called in law.

In the present case it was argued strongly on behalf of the plaintiff appellant, that the camel stands in a different category from ordinary English domestic animals, because it has not become a domestic animal in England. In my view that argument is fallacious. If an animal does not exist in a wild state in any part of the world, it has ceased altogether to be a wild animal, whether in England or in any other country. It is, in all countries, a domestic animal, an animal that has become trained to the uses of man, and a fortiori accustomed to association with man. With regard to that argument, it is also well to remember that it is the function of the judge and not of the jury to decide whether an animal belongs to the class of domestic animals or to the class of wild animals. I need say no more for the moment on this head—I think Clauson L.J. will probably add a few words on that aspect of the case. It is enough for the purposes of my judgment to say that in this case the learned judge in my view rightly decided that the camel must be regarded as a domestic animal.

If that is so, then the cause of action that the plaintiff had was not on the higher basis of absolute duty that rests upon the keeper of a wild animal, as it does upon a man who brings on his land any foreign matter or animal likely to escape and do damage, which is part of the law of this country as laid down by the House of Lords in the case of *Rylands* v. *Fletcher*. (2) The plaintiff's only course was either to prove knowledge by the defendant of the propensity to bite on the part of this camel or, on the other hand, to establish a case of negligence. However, I keep open the possibility of a general propensity to bite in all camels being established on different evidence in some future case.

I deal with the first of the alternatives left to the plaintiff in the present case. He produced no evidence at all that, at the time when he was unfortunately injured, the defendant had any knowledge that this camel had a propensity to bite people. Further, no evidence was given by any witness that the defendant had knowledge of the alleged propensity of most camels or many camels to bite people.

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(1) See Dogs Act, 1906 (6 Edw. 7, c. 32), ss. 1, 7; and Dogs (Amendment) Act, 1928 (18 & 19 Geo 5, c. 21), s. 1.

(2) (1868) L. R. 3 H. L. 330.

On the latter point, however, Mr. Harold Brown submitted to the Court that, as the defendant was a keeper of zoological gardens, the Court ought to presume that he had expert knowledge of the habits and nature of all camels as a species. In my view, it is not necessary to say more than that on the facts of this case, as proved by the evidence, no such propensity was established as would bring into operation any such presumption, even if in law it existed. Evidence was given for the plaintiff that some camels did bite, and that there was a risk of any camel biting; but the evidence of the defendant's witnesses to the opposite effect was very much stronger. The question of the character of a particular species of animals as to whether it is a wild animal or a domestic animal being an issue to be decided by the judge, it may follow in law that where the question is whether a particular class of domestic animal, such as a camel, is alleged to have a general propensity to bite, that issue is also one that should be decided by the judge. In these observations I am making certain legal assumptions in favour of the plaintiff's argument, but in my view, it is not necessary for the Court to decide them. It is clear that there was no evidence of knowledge on the part of the defendant that this camel had a propensity to bite; and there was no evidence that it had in fact such a propensity. In my view the plaintiff's own evidence, disregarding the defendant's evidence altogether, did not amount to evidence of such a general propensity as would justify the proposition submitted by Mr. Harold Brown, even if valid, that this defendant keeping an animal of that class ought to be presumed, because he has a zoological garden where he keeps the animal, to have such knowledge as would raise that presumption. That being so, in my opinion the plaintiff made no prima facie case on that alleged ground, any more than on the ground

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that this particular camel had a vicious propensity, and that the defendant knew of that vicious propensity. Consequently, in my judgment the learned judge was right in not leaving the issue on that part of the case to the jury. He rightly decided that there was no evidence to go to the jury on either of those two contentions. In saying that, I assume that Mr. Harold Brown made the wider submission plain to the learned judge. I am not sure that he did, but I have given him the benefit of the doubt.

The other aspect of the case was that of negligence. The plaintiff put it in this way. He contended that the defendant ought to have known that it was dangerous to have so flimsy and ineffective a fence as this wire-netting fence within which the camel was kept. But, as I put to Mr. Harold Brown in argument, that submission rested upon the unproved assumption that the defendant knew that there was a danger of the camel not only putting its head over the fence, and pressing it down, but of its then biting somebody. If he had not that knowledge, there was nothing to give rise to any duty on his part to have a more effective fence. This case differs wholly from the case which he cited to us, decided by the Court of Appeal towards the end of last year, of *Aldham* v. *United Dairies* (*London*), *Ld.* (1) I may say, however, that that was a case where there was independent evidence of negligence, apart from any knowledge of a propensity to bite on the part of the pony, to cause injury to mankind. For that reason, in my view, that authority has no bearing upon the present case.

These considerations lead me to the general conclusion that the learned judge's judgment in this case was wholly right, and is open to no attack at all. The various cases on the law as to dangerous animals were considered by us: but the law is so well known that I do not think it necessary to refer to them.

In my opinion the appeal should be dismissed with costs.

MacKinnon L.J. I agree. The law upon this topic has been settled for a very long while. The leading cases begin with a decision of Lord Holt in 1699. (1) The principle has nowhere been better laid down than in the judgment of Bowen L.J. in *Filburn* v. *People's Palace and Aquarium Co., Ld.* (2), where he said: " The broad principle that governs this "case is that laid down in *Fletcher* v. *Rylands* (3), that a person "who brings upon his land anything that would not naturally "come upon it, and which is in itself dangerous, must take "care that it is kept under proper control. The question of "liability for damage done by mischievous animals, is a "breach of that law which has been applied in the same way "from the times of Lord Holt and of Hale until now. People "must not be wiser than the experience of mankind. If from "the experience of mankind a particular class of animals is "dangerous, though individuals may be tamed, a person who "keeps one of the class takes the risk of any damage it may "do. If, on the other hand, the animal kept belongs to a "class which, according to the experience of mankind, is not "dangerous, and not likely to do mischief, and if the class is "dealt with by mankind on that footing, a person may safely "keep such an animal, unless he knows that the particular "animal that he keeps is likely to do mischief." This is a case in which an animal, a camel, having done harm to the plaintiff, he sues the defendant as owner of the camel. The question of the defendant's liability depends primarily upon the question into which of the two classes of animals specified by Bowen L.J. does the camel come. Is it of a class of wild animals of which individuals may be tamed; or is it of the other class of animals which are tame, or mansuetæ naturæ, but notoriously may sometimes develop vicious habits? If it is in the second class, then the plaintiff, in order to establish the defendant's liability, must prove that the defendant knew that this particular animal which he kept was likely to do mischief. The learned judge has held, upon overwhelming evidence, that the camel is within the class of tame animals, and not within the class of wild animals.

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(1) Ante, p. 507.

(1) *Mason* v. *Keeling* (1699) 12 Mod. 332; 1 Ld. Raym. 606.

(2) 25 Q. B. D. 258, 261.

(3) L. R. 3 H. L. 330.

The evidence was conclusive that, in fact, camels are among the oldest domesticated animals in the world.

That being so, though a particular camel may have vicious tendencies, as particular dogs or cattle may have vicious tendencies, the defendant is not liable unless the plaintiff proves that he knew that this particular animal was likely to do mischief. There being no evidence to that effect, the plaintiff fails to prove what is an essential element in his cause of action against the defendant. That being so, the learned judge rightly gave judgment for the defendant, and I agree that the appeal should be dismissed.

Clauson L.J. I agree. I should be content to say that I can find no flaw in the judgment of the learned judge in the Court below. I should like, however, to add a word as to the part taken in the matter by the evidence given as to the facts of nature in regard to camels. That evidence is not, it must be understood, in the ordinary sense evidence bearing upon an issue of fact. In my view the exact position is this. The judge takes judicial notice of the ordinary course of nature, and in this particular case of the ordinary course of nature in regard to the position of camels among other animals. The reason why the evidence was given was for the assistance of the judge in forming his view as to what the ordinary course of nature in this regard in fact is, a matter of which he is supposed to have complete knowledge. The point is best explained by reading a few lines from that great work, the late Mr. Justice Stephen's, "Digest of the Law of Evidence." In the 12th edition, Article 62 is as follows: "No evidence "of any fact of which the Court will take judicial notice "need be given by the party alleging its existence; but "the judge, upon being called upon to take judicial "notice thereof, may, if he is unacquainted with such fact, "refer to any person or to any document or book of reference "for his satisfaction in relation thereto, or may refuse to take "judicial notice thereof unless and until the party calling upon "him to take such notice produces any such document or "book of reference." From that statement it appears that the document or book of reference only enshrines the knowledge of those who are acquainted with the particular branch of natural phenomena; and in the present case, owing to some extent to the fact that there appears to be a serious flaw in a statement in a well known book of reference on the matter here in question, the learned judge permitted, and properly permitted, oral evidence to be given before him by persons who had, or professed to have, special knowledge with regard to this particular branch of natural history. When that evidence was given and weighed up with the statements in the books of reference which were referred to, the facts became perfectly plain; and the learned judge was able without any difficulty whatever to give a correct statement of the natural phenomena material to the matter in question, of which he was bound to take judicial notice.

I agree that the appeal should be dismissed.

Harold Brown. I ask for leave to appeal to the House of Lords. This is the first case under English law where an animal not native in England has been held to be domestic in England. It is an important point, in my submission.

Scott L.J. I do not think we ought to give that leave. On the facts proved, of which the learned judge and this Court are entitled to take judicial notice, there is nowhere in the world a camel which is wild and not domesticated and used in the service of man, and the law is clear that in England, as elsewhere, the camel is a domestic animal. It is not open to you to contend that the camel is a wild animal anywhere.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors for appellant: *Gordon Gardiner, Kearton & Co.*
Solicitors for respondent: *Watson, Sons & Room.*

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Overruled. AMALGAMATED, ETC. *v.* WILDS. [1948] A. C. 440

Disapproved. AMAL. ANTHRACITE COLLIEIRES, LTD. *v.* WILDS. [1948] 2 All E.R. 252.

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March 11, 12, 18.

EVANS *v.* OAKDALE NAVIGATION COLLIERIES, LIMITED.

Workmen's compensation—Accident—Partial incapacity followed by notional accident—Industrial disease—Maximum compensation—Mode of assessment—Average weekly earnings during twelve months when last employed in the process—Various Industries (*Silicosis*) *Scheme,* 1931—*Workmen's Compensation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1; *s.* 9, *sub-s.* 1 (*b*), *sub-s.* 2 (*i.*); *s.* 43.

Where a workman is rendered totally incapable by a physical accident arising out of and in the course of his employment, after a previous accident which caused partial incapacity, compensation must be reckoned with reference to his average weekly earnings immediately before the second accident. But where the accident which caused partial incapacity is followed by a notional accident founded on silicosis or other industrial disease the workman is to be assumed as being of full earning capacity immediately before the certified date of the notional accident. Therefore by the Workmen's Compensation Act, 1925, s. 9, sub-s. 2, and the Various Industries (Silicosis) Scheme, 1931, compensation is fixed by reference to his average weekly earnings during the previous twelve months in which he was last employed in the process which gave rise to the industrial disease.

Thompson v. *London and North Eastern Ry. Co.* [1935] 2 K. B. 90 distinguished.

Bacon v. *A. W. Wills & Sons, Ld.* [1933] 2 K. B. 493, and *Cole* v. *Amalgamated Anthracite Collieries, Ld.* (1933) 26 B. W. C. C. 560 followed.

Sect. 9, sub-s. 1 (*b*), of the Workmen's Compensation Act, 1925, provides that in fixing the amount of compensation "regard "shall be had to any payment, allowance, or benefit which the "workman may receive from the employer during the period of "his incapacity." The "payment, allowance, or benefit" here mentioned is confined to a payment, allowance, or benefit received from the employer in respect of the incapacity for which compensation is being assessed and does not extend to payment, allowance, or benefit received in respect of some other injury.

APPEAL by employers against award of judge of Tredegar County Court sitting as arbitrator under the Workmen's Compensation Act, 1925.

The following statement of the facts is taken from the judgment of Slesser L.J. On August 12, 1935, Thomas Evans, a collier, met with an accident while working for the appellants. At the time he was earning 3*l.* 11*s.* 1*d.* a week.

Several of his ribs were fractured and from then until December 9, 1936, he was paid compensation on the basis of total incapacity at the rate of 30*s*. a week. On that date, his employers, asserting that his earning capacity was then to be assessed at 1*l*. 17*s*. 6*d*. a week, later taken to be 1*l*. 19*s*. 0*d*., and having served notice under s. 12 of the Workmen's Compensation Act, 1925, after examination of the workman by their doctor, reduced the compensation to 19*s*. a week. On February 22, 1937, the Silicosis Medical Board certified the workman to be suffering from silicosis as a result of his employment and dated back the disability to November 18, 1936. Thereafter, the employers again paid him 30*s*. a week, allocated as to 16*s*. 9*d*. for the partial incapacity due to the rib accident, and as to 13*s*. 3*d*. in respect of silicosis. On July 15, 1937, the employers served a notice on the workman alleging that he had wholly recovered from the effects of the rib accident, but they continued to pay him 30*s*. solely in respect of the silicosis. On August 22, 1938, the workman claimed arbitration, alleging that, apart from the 30*s*. which he was receiving in respect of silicosis, he was still entitled to the 16*s*. 9*d*. in respect of the rib accident. On December 16, 1938, the county court judge, sitting as arbitrator, held that the workman on November 18, 1936, at the time of the notional accident, i.e. the silicosis, and thereafter, was still partially incapacitated from the rib accident, and he awarded the workman 16*s*. 9*d*. a week from July 15, 1937, when the employers had stopped that payment. The employers unsuccessfully appealed to the Court of Appeal and the award was affirmed. In that appeal, which came before Greene M.R., Clauson and du Parcq L.JJ. (1), Greene M.R. pointed out that, in accordance with *Wheatley* v. *Lambton, Hetton and Joicey Collieries, Ld.* (2), so long as the total incapacity lasted from the first accident, no compensation could be recovered in respect of the second, but that, where the workman at the date of the second accident was a partially incapacitated man, there would be a proportion of incapacity on which the second accident could operate. *Thompson* v.

(1) (1939) 32 B. W. C. C. 51, 56. (2) [1937] 2 K. B. 426.

London and North Eastern Ry. Co. (1) In the present proceedings the workman, founding his claim solely on the silicosis, claimed 30*s.* a week on the basis of total incapacity from December 17, 1936, credit being given for amounts received. He stated that since July 15, 1937, he had received only 1*l.* 2*s.* 3*d.* a week compensation in respect of the silicosis, based on an earning capacity agreed by the employers and himself to be 1*l.* 19*s.* owing to his existing partial incapacity on November 18, 1936, brought about by the rib accident. He contended that by the provisions of the Silicosis Scheme, 1931, he was entitled to assess his pre-accident earnings before November, 1938, for the purpose of assessing compensation for incapacity due to silicosis on the basis of his earnings during the twelve months in which he was last employed in the process in which he contracted the disease, that is, from August, 1934, to August, 1935, when his average weekly earnings were over 3*l.* That sum would entitle him, on the basis that he was then of normal capacity, to compensation at the rate of 30*s.* a week and not the 1*l.* 2*s.* 3*d.* actually paid. The judge held, following *Bacon* v. *A. W. Wills & Sons* (2) and *Cole* v. *Amalgamated Anthracite Collieries* (3), that the workman was entitled to full compensation at 30*s.* a week, based on his earnings for the relevant twelve months in the process which caused the disease.

The employers appealed. The appeal was heard on March 11, 12, 1940.

F. W. Beney (*Griffith Williams* with him) for the employers. The arbitrator was wrong. If the average weekly earnings of a workman when in full work were £*x* and he loses capacity owing to a cause other than disease and can only earn £*y*, subsequent disablement by disease only deprives him of the power to earn £*x* – £*y* and compensation must be fixed on that basis. The Workmen's Compensation Act, 1925, s. 9, sub-s. 2, para. 1, provides that a weekly payment by way of compensation shall be a sum "not exceeding 50 per cent. of the workman's

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(1) [1935] 2 K. B. 90.
(2) [1933] 2 K. B. 493.
(3) (1933) 26 B. W. C. C. 560.

"average weekly earnings during the previous twelve months." This, however, merely provides a maximum and does not alter the general principle that the amount of compensation must be related to the loss of earning power caused by the injury: *Thompson* v. *London and North Eastern Ry. Co.* (1) and *Wheatley* v. *Lambton, Hetton and Joicey Collieries, Ld.* (2) There is no difference in principle between the case where injury overtakes a wholly incapable man and the case where the man is partially disabled only. In neither case is he to be compensated for what he has already lost. The Silicosis Scheme, 1931, provides that compensation shall be calculated with reference to the earnings of the workman under the employer who last employed him in the process which caused the disease. But neither that Scheme, nor the rules under the Act of 1925, should be so interpreted as to increase or diminish the right to compensation under the Act itself. In so far as this or any other Scheme purports to do so it is ultra vires. *Bacon* v. *A. W. Wills & Sons* (3), only decides that the words "average weekly earnings during the previous twelve months" in s. 9, sub-s. 2, of the Act must be construed as referring to the previous twelve months during which the workman was employed in a process within the Silicosis Scheme. In *Cole* v. *Amalgamated Anthracite Collieries* (4) the Court merely followed *Bacon's* case. (3) Finally, if the employer who has to pay compensation for disease has already paid compensation for the same period for incapacity due to another accident, he can ask the arbitrator to have regard to those payments when assessing compensation for the disease: see s. 9, sub-s. 2 (*b*) of the Act.

Blanco White K.C. and *A. A. Warren* for the workman. This case is distinct from *Thompson's* case (1) and *Wheatley's* case (2), which dealt with workmen suffering from successive physical accidents. Here a "notional" accident, i.e. silicosis, followed the previous physical injury which had produced partial incapacity, and the case is, therefore, governed by *Cole* v. *Amalgamated Anthracite Collieries* (4) which followed

(1) [1935] 2 K. B. 90.
(2) [1937] 2 K. B. 426.
(3) [1933] 2 K. B. 493.
(4) (1933) 26 B. W. C. C. 560.

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Bacon's case. (3) It is irrelevant that there was a previous accident for which compensation had been received. The Silicosis Scheme directs attention to a particular period of twelve months as the basis of compensation. The true interpretation of s. 9, sub-s. 2, para. 1, of the Act is stated in the headnote to *Bacon's* case. (1) The company is not in a position to contest the award of 30*s*. a week in respect of the total incapacity from silicosis, because they paid this sum each week to the workman in respect of silicosis alone, from July, 1937, to November, 1938, and this constituted a binding agreement.

Beney in reply. There is no record of any such agreement and it cannot be relied on here.

Cur. adv. vult.

1940. Mar. 18. The following judgments were read :—

SLESSER L.J. (whose judgment was read by LUXMOORE L.J.) stated the facts as set out above and continued : A distinction must be made in considering cases where one accident follows another, between those where both are actual physical accidents and those where the later accident is notional, arising from a doctor's certificate, under s. 43 of the Workmen's Compensation Act, 1925, or under the Silicosis Scheme—accidents certified in case of industrial disease. The reason for this distinction is due to the fact that in the case of the Silicosis Scheme, 1931, the Metal Grinding Industries Scheme, 1927, and s. 43 of the Act, *Bacon* v. *A. W. Wills & Sons* (1), which was decided under clause 8 of the Metal Grinding Industries Scheme, 1927, establishes that s. 9, sub-s. 2, of the 1925 Act (here to be read with clause 9 of the Various Industries (Silicosis) Scheme, 1931), must be read when computing the pre-accident earnings and the amount of compensation, as if it were " the weekly "payment shall be a sum not exceeding 50 per cent. of the "workman's weekly earnings during the previous twelve "months in his employment in the process which gives rise "to the disease."

In the case of two actual physical accidents, where the pre-accident earnings are to be computed on the basis of the previous twelve months according to the plain words of s. 9, sub-s. 2, of the Act, and a claim is made as regards a second accident while incapacity still exists from a former one, the compensation for the later accident can only be that proportion of incapacity on which the second accident can operate. This basis of ascertainment of the second pre-accident wage, where two physical accidents are concerned, is not here questioned and is supported by the authority of such cases as *Harwood* v. *Wyken Colliery Co.* (1), and *Thompson* v. *London and North Eastern Ry. Co.* (2), and the dicta of the Master of the Rolls in the earlier appeal in this case (*Evans* v. *Oakdale Navigation Collieries, Ld.* (3)), which last were made obiter and, I think, are to be treated as dealing with the earlier cases on this principle only.

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(1) [1933] 2 K. B. 493.

Another possibility, which applies whether the second accident is notional or not, is where the first accident has produced a state of total disability. In such a case there is no capacity on which the second accident can operate, and this notwithstanding the interpretation which is required by *Bacon's* case (4) to be put on s. 9, sub-s. 2, of the Act in the case of industrial diseases. These were the facts in *Wheatley's* case (5) which was a case of a second notional accident—nystagmus—supervening on a previous accident which had caused total disability. There a workman, who had been totally incapacitated by a physical injury to his spine, receiving 30*s.* full compensation, was subsequently, while in receipt of that compensation, certified to be suffering from miners' nystagmus. He claimed a further sum of 24*s.* a week as compensation as well as the 30*s.* for his physical accident on the basis of a lower rate of wages which he had been earning during a temporary return to work after the spinal injury and before he became totally incapacitated from that injury. It was held that so long as he was totally incapacitated from the spinal injury he could not be regarded as being incapacitated from nystagmus,

(1) [1913] 2 K. B. 158.
(2) [1935] 2 K. B. 90.
(3) 32 B. W. C. C. 51, 56.
(4) [1933] 2 K. B. 493.
(5) [1937] 2 K. B. 426.

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since he had no capacity left to lose. The case for that reason was distinguished from the cases where there was left after the first accident existing partial incapacity on which the second accident could operate.

But the problem here raised is a different one, distinguishable from both those above mentioned. On November 18, 1936, unlike the facts in *Wheatley's* case (1), there was some capacity in the workman, the disability produced by the rib accident which the silicosis could be said to affect being then only partial, and the question then arises how should that capacity be quantified. According to the employers, owing to the partial incapacity due to the rib injury, on the principle of *Harwood's* case (2) and *Thompson's* case (3), there is left only a capacity of 1*l.* 19*s.*, as in the case of two physical accidents. According to the workman, he must be notionally regarded as having on November 18, 1936, a full earning capacity of 3*l.* 11*s.* a week which has been totally destroyed by the silicosis. The result in compensation would be 1*l.* 2*s.* 3*d.* or 1*l.* 10*s.* respectively.

In my judgment, *Cole* v. *Amalgamated Anthracite Collieries* (4) decides this issue in the workman's favour. There the average weekly earnings were 2*l.* 16*s.* 8*d.* when the workman gave up work in November, 1929, by reason of sickness which proved to be silicosis. From June, 1930, to March, 1931, he returned to work with the same employers as a whitewasher at the rate of 2*l.* 5*s.* 4*d.* a week. On May 12, 1932, he was certified to be suffering from silicosis, as from January 1, 1932. At that time his earning capacity, owing to illness (as here owing to the rib accident), was reduced to 2*l.* 5*s.* 4*d.* a week, and the county court judge, treating the case as falling within the principle to be applied where the second accident was not notional, gave judgment for compensation on that lesser basis for 1*l.* 2*s.* 8*d.* a week. The workman appealed, asking for 50 per cent. of his underground collier's wages of 2*l.* 16*s.* 8*d.*, an increase of 5*s.* 8*d.* in the compensation, that is, he claimed to treat the notional accident as destroying his full capacity. The Court, applying *Bacon's* case (1), allowed the appeal. Romer L.J. said: "This Court has laid down a general principle, as I understand the judgments" in *Bacon's* case (1) "applicable to all cases in which one has "to apply the provisions of s. 9, sub-s. 2, of the 1925 Act to "such schemes as the Silicosis Scheme with which we have to "deal in this case." He quoted with approval the headnote to *Bacon's* case (1) in the Law Reports, that "the provision in s. 9, sub-s. 2, of the Act that the weekly payment "of compensation in cases of total incapacity shall be fixed "by reference to the workman's average weekly earnings "during the previous twelve months must for the purpose "of the Scheme be moulded so as to apply to the altered "circumstances, by treating it as referring to the previous "twelve months during which the workman was employed "in a process coming within the Scheme." (2)

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(1) [1937] 2 K. B. 426.
(2) [1913] 2 K. B. 158.
(3) [1935] 2 K. B. 90.
(4) 26 B. W. C. C. 560, 568.

Thus the workman in the present case notionally met with his silicosis accident on November 18, 1936, and during the year of his notional injury preceding the accident—the disease—he is to be deemed to have been physically capable of earning 3*l.* 11*s.* his full wage. The case is taken out of the category of a second physical accident acting on an already limited capacity, as in *Harwood's* case (3) and *Thompson's* case (4), and must be deemed to be one where, notwithstanding the actual partial incapacity due to the rib accident, the Silicosis Scheme requires the workman in the circumstances to be assumed to be of full capacity and capable of earning 3*l.* 11*s.* a week at the date when he was certified in November, 1936, to be totally incapacitated by silicosis.

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(1) [1933] 2 K. B. 493.

(2) In his judgment in *Cole* v. *Amalgamated Anthracite Collieries* (26 B. W. C. C. 560, at p. 570), Slesser L.J. said: "I should like "to add that in *Bacon* v. *Wills & "Sons* there is a passage in my "judgment in 26 B. W. C. C. on "p. 388 to this effect, 'I read "'the reference to "the previous "'"twelve months" to mean the "'twelve months previous when "'the employer was actually last "'employing the man.' To that "passage should be added these "words—'in the process.' That "question did not arise in terms "in that particular case, but that "was my intention, and it agreed "with what had already been stated "by [Lord Hanworth M.R.] and "Lawrence L.J."

(3) [1913] 2 K. B. 158.

(4) [1935] 2 K. B. 90.

In *Cole's* case (1), as I have indicated, a similar situation existed. The workman having a notional accident on January 1, 1932, was capable, by reason of his illness of working only as a whitewasher. He had been a whitewasher from June, 1930, to March, 1931, and the county court judge taking his pre-accident earnings on an average weekly basis from 1931 to 1932, awarded him compensation at a lower rate. Nevertheless, this Court, construing the Scheme, as Romer L.J. points out, according to *Bacon's* case (2), went back to the year when, fully capable as a collier, he had contracted the disease. Once it is realized that in industrial disease, the Legislature, in its humorous wisdom, has ordained that, contrary to natural experience, the injury (the disease) must be regarded as preceding the accident (the certification), the apparent paradox of a notional full capacity, when actually there is partial disability, is resolved.

Finally, Mr. Beney contended that the past payments in respect of the rib injury were payments within s. 9, sub-s. 1 and sub-s. 6, of the 1925 Act, and should be taken into account in favour of the employers. Such a consideration must fail, because those payments were made in discharge of a different liability arising from a different accident from the liability to pay compensation in respect of silicosis here relied on.

In the view I have taken it is not necessary for the workman to rely on the alleged agreement to pay him 30*s.* a week for compensation for silicosis to be deduced from such payments from July, 1937, to November, 1938, on receipts shown to be for silicosis alone. The absence of a recording of such an agreement, if found, might be an obstacle to reliance on it in a claim: see *David Colville & Sons* v. *Tigue.* (3) In fact the judge has found no such agreement. I do not think it necessary, in the circumstances, definitively to pronounce on it.

LUXMOORE L.J. The question raised by this appeal is how compensation ought to be assessed under the Workmen's

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(1) 26 B. W. C. C. 560.
(2) [1933] 2 K. B. 493.
(3) (1905) 8 F. 179.

Compensation Act, 1925, and the Various Industries (Silicosis) Scheme, 1931, made and amended under that Act, in respect of the disability of a workman who was certified as totally incapacitated by silicosis as from November 18, 1936, when at that date he was being paid compensation for incapacity arising from an injury by accident suffered on August 12, 1935.

The county court judge awarded the workman compensation in respect of the total incapacity from silicosis at the rate of 30*s*. a week, having fixed that sum with reference to the average weekly earnings of 3*l*. 11*s*. earned by the workman during the twelve months immediately preceding the cesser, on August 12, 1935, of his employment as a coal miner working underground. The employers, the Oakdale Navigation Collieries, Ld. (hereinafter referred to as " the company "), employed the workman not only before and at the time of the accident of August 12, 1935, but also after that date, when the workman had recovered sufficiently from the results of the injury by accident on August 12, 1935, to be able to do light work. The company contended that the compensation for the disablement by silicosis ought to be fixed with reference to the average weekly wage of 1*l*. 19*s*., which the workman was deemed to be capable of earning as a partially incapacitated man immediately before the certificate of total disablement was given. The company submitted to pay to the workman in respect of the incapacity from silicosis at the rate of 1*l*. 2*s*. 3*d*. a week in addition to the sum of 16*s*. 9*d*. a week which it was paying to the workman as compensation for his partial incapacity arising from the other injury under an award made by the same county court judge dated December 13, 1938, and affirmed by this Court on April 4, 1939: *Evans* v. *Oakdale Navigation Collieries*. (1) The company has appealed from the award of the county court judge in respect of the disablement by silicosis and relied on the contention to which I have already referred.

The right to compensation in respect of disablement by silicosis is covered by s. 47 of the Act of 1925, which gives power by Scheme to provide for payment of compensation by

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(1) 32 B. W. C. C. 51.

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employers of workmen in any specified industry involving exposure to silica dust who are certified in the prescribed manner to have suffered total disablement from silicosis. Sect. 47, sub-s. 2, provides that the scale of compensation fixed in the case of total disablement due to silicosis where (as in the present case) it is not accompanied by tuberculosis shall be prescribed by the Scheme. Sub-s. 4 provides that any Scheme made under the section is to " have effect as if "enacted in this Act," subject to certain conditions to which it is unnecessary to refer. The Various Industries (Silicosis) Scheme, 1931, was made and amended from time to time under the powers conferred by s. 47, and has statutory force by reason of the provisions of s. 47, sub-s. 4. The processes covered by the Scheme include any operation underground in any coal mine. Clause 5 of the Scheme provides that, if the workman has been employed in the processes for a period or periods amounting to not less than five years, the disease shall be deemed to be due to employment in the processes, unless the employer proves the contrary. It is, I understand, common ground that the workman in the present case was immediately before the accident on August 12, 1935, employed underground by the company in its coal mine and had been so employed for more than the preceding five years.

By clause 8, sub-clause 1, of the Scheme it is provided that the compensation shall be claimed and recoverable from the employer who last employed the workman in the process. The last employer is admittedly the company. By clause 9 of the Scheme it is provided that in cases of total disablement the compensation under the Scheme shall be determined in accordance with the provisions contained in the Act for fixing the compensation in cases of total incapacity. This incorporates into the Scheme the provisions of s. 9 of the Act. Sect. 9, sub-s. 2, para. 1, provides that " the weekly payment "shall . . . . be a sum not exceeding 50 per cent. of the "workman's average weekly earnings during the previous "12 months." That is subject to the alteration made by clause 9, sub-clause 3, of the Scheme that, in the application of the provisions of the Act, the amount of compensation shall be calculated with reference to the earnings of the workman under the employer from whom compensation is recoverable under the Scheme. The material provisions of the Act and the Scheme when applied to the present case, if considered apart from any of the decided cases, appear to contradict the contention put forward on behalf of the company. The express words of clause 9, sub-clause 3, provide that the earnings to be considered are not those earned by the workman in the twelve months previous to the date of the disablement, but those earned by him under the employer from whom the compensation is recoverable. To apply these words to the facts of the present case, the compensation to be paid to the workman in respect of his total disablement by silicosis is to be calculated with reference to the average weekly earnings of 3*l.* 11*s.*, and not with reference to the average weekly earnings of 1*l.* 10*s.* which he is deemed to be capable of earning owing to his partial incapacity arising from the accident of August 12, 1935.

I am unable to find any words, either in the Act or in the Scheme, to suggest that in any case the compensation for total disablement by silicosis is to be calculated with reference to any average weekly earnings other than those of the workman under the employer who last employed the workman in the process in which the notional injury by accident caused by contracting silicosis arose, or with reference to any want of capacity other than total incapacity. It was said that there are a number of reported cases which lead to a different conclusion. During the argument our attention was called to a large number of these cases. It is not from want of respect for them or for the skilful argument of Mr. Beney that I refrain from dealing with the majority of those cases, for in my judgment practically all of them are clearly distinguishable on their facts from the present case. It is sufficient to point out that there is a material difference between the case where a workman is, in the first instance, partially incapacitated by an injury by accident as distinct from a notional accident by disease and is then rendered totally incapable by reason of a second accident which is also

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not a notional one, and the case where the original partial incapacity is followed by total incapacity arising from a notional accident caused by industrial disease. In the former case the compensation in respect of the second accident, which resulted in the partial incapacity from the first accident becoming total incapacity, must on the true construction of the Act be calculated with reference to the average weekly earnings immediately preceding the second accident: see *Harwood* v. *Wyken Colliery Co.* (1), and *Thompson* v. *London and North Eastern Ry. Co.* (2) Of course, if, as the result of the first accident, the workman suffers total disability, it matters not whether he is subsequently certified to be suffering from an industrial disease which also has rendered him totally incapacitated, for in such a case there is no capacity for work on which the notional accident can operate; *Wheatley* v. *Lambton, Hetton and Joicey Collieries.* (3) As Greene M.R. pointed out in the earlier appeal—*Evans* v. *Oakdale Navigation Collieries* (4)—so long as the total incapacity lasted from the first accident, no compensation could be recovered in respect of the second accident, although in respect of the second accident a declaration of liability might properly be obtained.

I think that the view which I have expressed with regard to the construction of the Act and the Scheme is supported by the decision of this Court in *Cole* v. *Amalgamated Anthracite Collieries.* (5) That case was relied on by the county court judge in support of his finding, and I think that he was fully justified in such reliance. In the earlier appeal between the workman and the company it was held that the workman was entitled to receive the compensation awarded to him in respect of the partial incapacity arising out of the accident of August 12, 1935, notwithstanding the certificate of total incapacity arising from silicosis. I have been unable to find anything in the judgment of the Court in that case which could be said to cover the question to be determined on this appeal.

In my judgment, this case must be decided on the plain words of the Act and the Scheme. On this basis I am satisfied that the decision of the county court judge is correct and should be upheld.

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(1) [1913] 2 K. B. 158.
(2) [1935] 2 K. B. 90.
(3) [1937] 2 K. B. 426.
(4) 32 B. W. C. C. 51, 56.
(5) 26 B. W. C. C. 560.

Mr. Beney also argued that, apart from the question of the proper construction of the Act and the Scheme, the company had during the period of incapacity paid compensation to the workman in respect of disability arising out of the accident of August 12, 1935, and that by reason of the provisions of s. 9, sub-s. 1 (*b*), of the Act of 1925, the company was entitled to ask the county court judge and this Court to have regard to those payments in fixing the compensation for total incapacity due to silicosis. That sub-section provides that, in fixing the amount of the weekly payments, regard shall be had to any "payment, allowance or benefit," which the workman may receive from the employer during the period of his incapacity. In my opinion, this "payment, allowance "or benefit" is, on the true construction of the section, confined to payment, allowance or benefit received from the employer in respect of the incapacity arising from the particular injury under consideration, and does not extend to payment, allowance or benefit received in respect of some other injury or for some wholly independent reason.

There is one further matter to which I must refer. It was argued on behalf of the workman that the company was unable to contest the award of 30*s.* a week in respect of the total incapacity from silicosis, because the company had from July, 1937, to November, 1938, paid to the workman a weekly sum of 30*s.* in respect of the silicosis alone, and that that was sufficient to constitute a binding agreement between the parties. It is sufficient, to dispose of this argument, to point out that the question whether there is in existence an agreement of the nature claimed is one to be determined by the arbitrator: see ss. 21 and 23 of the Act of 1925. An unrecorded agreement can only be used as an answer to a request for arbitration or as a defence to an action. It cannot be itself the subject of arbitration proceedings under the Act: see *David Colville & Sons* v. *Tigue.* (1)

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(1) 8 F. 179.

For the reasons which I have expressed I agree that the conclusions at which the county court judge arrived are correct, and that there is no ground for altering his award in any respect. The appeal fails with the usual consequences.

GODDARD L.J. I agree that this appeal fails. Under clause 8 of the Silicosis Scheme made under the Act compensation is recoverable from the employer who last employed the workman in the process which caused the disease, in this case coal mining. By clause 9, sub-clause 3, the amount is to be calculated with reference to the earnings of the workman under the employer from whom compensation is payable. If I may have regard only to the words of the Scheme, which for this purpose has the effect of a statute, and am unhampered by authority, I think it is clear that all the arbitrator has to do is to see what the man was earning in the process which caused the disease. In this case the answer is 3*l.* 11*s.* If he worked for employer A at such a process and earned 3*l.* 11*s.* and afterwards, but before certification, worked for employer B, in whose service he met with an accident which reduced his earning capacity to 1*l.* 19*s.*, it seems to me that, if I looked at the 1*l.* 19*s.* as the basis on which to calculate compensation, I should be disregarding the plain words of the statute, for the workman never earned that sum under the employer by whom compensation for silicosis is payable. It cannot, in my opinion, make any difference that he remains with the same employer, though in a different capacity.

But Mr. Beney argued that there are cases binding on this Court which decide the contrary. In my opinion, there is no case which so decides. No doubt, the cases show that, if a man is working as a partially disabled man at a certain wage and meets, while working at that wage, with a further accident, his compensation for the latter accident is to be calculated on the wage which he was earning at the time when he met with it: see *Harwood* v. *Wyken Colliery Co.* (1) and *Thompson* v. *London and North Eastern Ry. Co.* (2) But the reasoning on which those cases were decided does not apply,

(1) [1913] 2 K. B. 158.

(2) [1935] 2 K. B. 90.

in my opinion, to cases of industrial disease which have a code of their own. In such cases regard is to be had, not to the wage the man was earning at the date of the certification, which is the date of the notional accident, but to the wage he was earning when he contracted the disease, or, to use the language of the Scheme, when he was last employed in the process.

The case most relied on by Mr. Beney was *Wheatley* v. *Lambton, Hetton and Joicey Collieries* (1), but when properly understood that case has no application to the present facts. There a man was totally disabled by an accident in the popular sense, an injury to his spine. While so disabled he developed nystagmus and got a certificate of total disablement. The date of that disablement, and, therefore, of the notional accident, was subsequent to that of the accident causing the spinal injury. The Court held that you could not add to totality, or substract from nothing, and so, as, at the date when the " accident " from nystagmus occurred, the workman was already totally disabled, he could recover nothing for the latter injury. He was, however, granted a declaration of liability in case he recovered from the spinal injury. The man in that case had not at any material time a capacity on which the second accident could operate, while in the present case he had. It is, of course, impossible for the precise question we have to consider to arise except in connection with an industrial disease which gives rise to this conception of notional accident, or notional date of accident, because it is impossible for a workman totally disabled by accident to meet with another accident in the popular sense arising out of and in the course of his employment which ex hypothesi he is disabled from following.

But, so far as authority is concerned, I think that *Cole* v. *Amalgamated Anthracite Collieries* (2), on which the learned county court judge relied, is an authority supporting the view he expressed. The workman there contracted the disease when working as a collier. At the date of the certificate, having previously been ill, he was working as a

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(1) [1937] 2 K. B. 426.

(2) 26 B. W. C. C. 560.

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whitewasher, in which latter work he could not have contracted the disease. He was held to be entitled to compensation as a collier.

This Court has already had the parties before them in an earlier case arising out of the accident which caused partial incapacity to the workman: *Evans* v. *Oakdale Navigation Collieries, Ld.* (1); but, having carefully read the judgment in that case, I am satisfied that the Court had not to consider the question of what compensation the workman was entitled to for silicosis, and, accordingly, there is no authority on the matter which we have to decide. On the question whether there was an agreement on which the workman could rely, I need say no more than that I agree with the judgment of Luxmoore L.J. on that point and that the workman cannot rely on it.

Appeal dismissed.

Solicitors to the appellants: *Furniss, Wells & Co., for A. J. Prosser, Cardiff.*

Solicitors to the respondent: *Smith, Rundell, Dods & Bockett, for T. S. Edwards & Son, Newport, Mon.*

(1) 32 B. W. C. C. 51.

F. P. F.

REX *v.* ARMY COUNCIL.

Ex parte SANDFORD.

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Mar. 13.

Practice—Appeal—Refusal to grant mandamus to Army Council to mitigate, remit or commute sentence of court martial—"Criminal "cause or matter"—Army Act, s. 57, sub-s. 2—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 31, *sub-s.* 1 (*a*).

A petition to the Army Council to mitigate, remit or commute a sentence of a court martial is a criminal cause or matter within the meaning of s. 31, sub-s. 1 (*a*), of the Supreme Court of Judicature (Consolidation) Act, 1925, and a motion to the Divisional Court to issue a mandamus to the Council to perform that duty is in a criminal cause or matter. Hence, an appeal to the Court of Appeal against the refusal of that motion is also in a criminal cause or matter, and the Court has no jurisdiction to deal with it.

Appeal from the refusal of the Divisional Court to grant an order of mandamus to the Army Council.

The appellant, Herbert Ronald Sandford, then a lieutenant-colonel in the Royal Engineers, Indian Army, was found guilty, under s. 41, sub-s. 5, of the Army Act, at a general court martial, held at Quetta and Karachi between January 8 and 29, 1934, on five charges of forging documents with intent to defraud and uttering forged documents knowing them to be forged with intent to defraud, and was sentenced to be dismissed the service, the findings being duly confirmed and sentence promulgated on March 5, 1934. In May, 1934, under s. 57, sub-s. 2, of the Army Act, as amended by s. 4 (*b*) and Sch. II., Part II., of the Army (Annual) Act, 1909, and para. 681 of the King's Regulations, the appellant petitioned the Army Council to review the proceedings before the court martial. The Army Council did so and they decided that the convictions on the first, second, fourth and fifth charges should be quashed and that "all record of the convictions "on those charges is to be erased," so that the appellant should be relieved of the consequences of those convictions. The Council, however, proceeded: "In view of the nature of "the third charge upon which the conviction stands, the

"Army Council can see no ground for interfering with the "sentence passed by the court and the necessary notification "will be published in the London Gazette of August 3, 1934."

On October 19, 1939, the appellant moved the Divisional Court (Lord Hewart C.J., Charles and Humphreys JJ.) " for "an order of mandamus that the Army Council be commanded, "according to law, to mitigate, remit or commute " the above sentence under s. 54, sub-s. 2, of the Army Act. The Divisional Court dismissed the motion.

The appellant appealed. The appeal was heard on March 13, 1940.

D. N. Pritt K.C. and *Kyffin* for the appellant.

Sir Donald Somervell A.-G. and *Valentine Holmes* for the Army Council. There is a preliminary objection to the hearing of this appeal, namely, that it is in a " criminal "cause or matter " within the meaning of s. 31, sub-s. 1 (*a*), of the Supreme Court of Judicature (Consolidation) Act, 1925. It cannot be doubted that the original trial by court martial was a criminal matter, and, that being so, the motion before the Divisional Court was in a criminal matter, and so is this appeal from their decision : *Ex parte Woodhall* (1) ; *Ex parte Schofield* (2) ; and *In re Clifford and O'Sullivan.* (3)

Pritt K.C. for the appellant. It is admitted that the trial by court martial was a criminal matter and that its decision was in a criminal matter. But those proceedings were all over ; had been finally concluded before the appellant moved the Divisional Court. All the appellant now asks is that the Court should order a body, which is not a judicial tribunal nor performing a judicial function, to perform its statutory duty, namely, that of considering the sentence. The position is the same as when application is made to the Home Secretary where a prisoner has been tried before an ordinary criminal court. If the Home Secretary refused to consider the sentence it is apprehended that the Court of King's Bench would order him to do his duty. That would not be in a criminal matter.

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(1) (1888) 20 Q. B. D. 832.

(2) [1891] 2 Q. B. 428.

(3) [1921] 2 A. C. 570, 579.

The fact that the Army Council can do things which a court can do does not constitute it a court. In *In re Clifford and O'Sullivan* Lord Sumner said (1): "I think the real test is "the character of the proceedings themselves which are the "subject-matter of the particular application, whatever it "be, that constitutes the cause or matter referred to." The Army Council, as a mitigating authority, is not a court.

SLESSER L.J. In this appeal the Attorney-General takes, by way of preliminary objection, the point that this Court, having regard to the provisions of s. 31, sub-s. 1 (*a*), of the Supreme Court of Judicature (Consolidation) Act, 1925, has no jurisdiction to hear it because it is an appeal from a judgment of the High Court in a criminal cause or matter.

Mr. Pritt, for the appellant, concedes that the proceedings before the court martial were in the nature of a criminal cause or matter. If authority be needed for that, it is to be found in the speeches of Lord Cave and Lord Sumner in *In re Clifford and O'Sullivan.* (1) Mr. Pritt, however, contends that the proceedings of the Army Council which are in question here, were not criminal proceedings and that any matters affecting them by way of mandamus are not themselves proceedings in a criminal cause or matter. It is clearly established that matters such as prohibition, certiorari and mandamus in relation to causes or matters which are criminal are themselves criminal causes or matters excluding this Court from exercising appellate jurisdiction. Authority for that proposition is to be found not only in the observations of the learned Lords in *In re Clifford and O'Sullivan* (1) but in a number of cases which has been cited to us.

The real question we have to consider is whether these proceedings before the Army Council, which were initiated by petition, were themselves criminal proceedings and raised questions of criminal matters to be determined. As has been pointed out to us, the jurisdiction of the Army Council to deal with these matters arises from two separate sources. First, there is the question whether the proceedings, as such, shall

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(1) [1921] 2 A. C. 570, 586.

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or shall not be quashed, and the power of the Army Council to deal with that matter is derived from the King's Regulations, which are themselves promulgated by the authority of the King's prerogative. That matter seems to me, so far, clearly and without any question to be a criminal proceeding. The question whether or not convictions before a court martial are illegal, or involve substantial injustice to the accused, and the consequential remedy when it is thought that remedy should be given, are matters dealing with the proceedings of the court martial. The rules contained in reg. 681 of the King's Regulations are expressly said to apply when the proceedings of a court martial, after confirmation, come under the review of any of the authorities specified in s. 57, sub-s. 2, of the Army Act, as amended by s. 4 (*b*) and Sch. II., Part II of the Army (Annual) Act, 1909. That section, which is thus imported into the prerogative regulations, gives specific power to the Army Council in the terms of s. 57, sub-s. 2 (as amended), of the Army Act, which I will read: " When a sentence passed by a court-martial has been "confirmed, the following authorities shall have power to "mitigate or remit the punishment thereby awarded, or to "commute such punishment for any less punishment or "punishments to which the offender might have been "sentenced by the said court-martial; that is to say, "(*a*) As respects persons undergoing sentence in any place "whatever . . . . the Commander-in-Chief." By s. 4 (*b*) and Sch. II., Part II., of the Army (Annual) Act, 1909, the powers of the Commander-in-Chief under this sub-section were transferred to the Army Council.

It is clear to my mind that, whereas it might conceivably be argued that the remission of a sentence was not necessarily a judicial act—an illustration has been given of the exercise of His Majesty's prerogative on the advice of the Home Secretary in the case of a person convicted before a civilian criminal court—the language of the sub-section extends to dealing with the punishment itself. It gives power to mitigate, or remit, or commute the punishment. The competent authority, therefore, when dealing with this matter, is exercising judicial functions as much as is the Court of Criminal Appeal when it is called on to reduce a punishment which has been awarded by a judicial authority exercising criminal jurisdiction. It is said by Mr. Pritt that the Army Council is not a court, but the question is not whether it is a court in any narrow sense of the word. The question is whether the decision of the Army Council is a judicial decision in a criminal cause or matter. If it be a decision in a criminal matter, we have no jurisdiction. It is most frequent for bodies, not being specifically courts or tribunals, to exercise judicial or quasi-judicial functions. *Board of Education* v. *Rice* (1) and cases against other Government authorities have abundantly displayed that principle. Often these quasi-judicial functions are exercised civilly, but it is a question of law whether they are exercised civilly or criminally, and if the right view be that the tribunal is vested with criminal jurisdiction which is of a judicial or quasi-judicial nature, then any matter affecting the exercise of that jurisdiction by prerogative writ, mandamus, certiorari or prohibition, is similarly, on the authorities, a proceeding in a criminal cause or matter.

Something has been said of the fact that the Army Council derives part of its power from the prerogative and part from statute. I do not think that that matter is decisive of the question in any way. There are many tribunals exercising criminal jurisdiction in this country which derive their authority originally from the common law, prerogative, or charter, and not from statute. Many of their powers were established before Parliament came into existence. The question is whether the body in question is or is not exercising a criminal function. In my opinion, the Army Council, in considering whether it will commute a sentence under the statute, or whether it will quash charges under the prerogative, is in both cases acting in a quasi-judicial capacity which is criminal.

Finally, I would say that the case seems to me to be entirely different from the so-called military court which fell for consideration in *In re Clifford and O'Sullivan.* (2) It was

(1) [1911] A. C. 179.

(2) [1921] 2 A. C. 570.

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pointed out by Lord Cave in that case (1) that it was "a body "of military officers entrusted by the commanding officer "with the duty of inquiring into certain alleged breaches of "his commands contained in the proclamation, and of advising "him as to the manner in which he should deal with the "offences; and its 'sentences,' if confirmed, will derive their "force not from the decision of the military Court, but from "the authority of the officer commanding His Majesty's "forces in the field." On that principle, Lord Sumner dissenting, the so-called military court in that case was held not to be a court or judicial tribunal. But here there is no question but that the court martial was performing its ordinary criminal functions under the Army Act, and that the Army Council was performing a function as a superior body analogous to that which the court martial itself, admittedly acting criminally, performed.

For this reason I think that the preliminary point succeeds and that this Court has no jurisdiction to entertain the appeal.

LUXMOORE L.J. I entirely agree with the judgment which has just been delivered and do not think it necessary to add anything.

GODDARD L.J. In my opinion, it is desirable to keep as strictly to the facts of the case brought before us as we can. I look at it in this way, which I think is the same way as that of my Lord. I take the definition of a criminal cause or matter from Lord Cave's speech in *In re Clifford and O'Sullivan* (2): "It must involve the consideration of some "charge of crime, that is to say, of an offence against "the public law (Imperial Dictionary, tit. 'Crime' and "'Criminal'); and that charge must have been preferred "or be about to be preferred before some court or judicial "tribunal having or claiming jurisdiction to impose punishment "for the offence or alleged offence. If these conditions are "fulfilled, the matter may be criminal, even though it is held

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(1) [1921] 2 A. C. 570, 581.

(2) Ibid. 580.

"that no crime has been committed, or that the tribunal has "no jurisdiction to deal with it (see *Reg.* v. *Fletcher* (1), per "Amphlett J.A., and *Rex* v. *Garrett* (2), per Bankes L.J.), "but there must be at least a charge of crime (in the wide "sense of the word) and a claim to criminal jurisdiction." In the same speech Lord Cave showed that a court martial was a court for this purpose. (3)

Here we have a charge of felony preferred against the appellant, and that charge was preferred before a court martial, which was a judicial tribunal having jurisdiction to impose punishment. The court martial having convicted and sentenced the appellant, the case came, under s. 57 of the Army Act, before the confirming authority, who confirmed it. That sentence having been confirmed, the Army Act, in s. 57, sub-s. 2, as amended by the Army (Annual) Act, 1909, confers a power on the Army Council to mitigate, or remit, or commute the sentence. When the matter was brought before the Army Council in the manner provided by the King's Regulations, which for this purpose are analogous to Rules of Court, the Army Council had to consider whether they would mitigate, remit, or commute the sentence, and they came to a decision on that matter. I cannot see, in those circumstances, why the Army Council were not acting just as much as a court as the original court martial. They were both performing duties imposed on them by the Army Act. I think that they were acting as a court, and, consequently, that their decision was in a criminal cause or matter within the authorities, so that this Court has no jurisdiction to entertain this appeal, which should be dismissed, with costs.

Appeal dismissed.

Solicitors for appellant : *Henry Mossop & Syms.*
Solicitor for respondents : *Treasury Solicitor.*

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(1) (1876) 2 Q. B. D. 43, 47.
(2) [1917] 2 K. B. 99, 105.
(3) [1921] 2 A. C. 570, 581.

W. L. L. B.

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Feb. 13, 28.

BROWN *v.* SHERWOOD COLLIERY COMPANY, LIMITED.

Workmen's compensation—Taxation of costs—Application by workman for reference to medical referee—Order made by county court registrar—Employers' appeal to judge—Judge's order—Both orders interlocutory—Cost of proceedings to be taxed accordingly—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sch. I., para.* 15; *Sch. II., para.* 2—*Workmen's Compensation Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 42), *ss.* 11, 14—*Workmen's Compensation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *ss.* 12, 17, 18, 19; *s.* 50, *sub-ss.* 1, 2.

Orders made by a county court registrar and a county court judge on an application made by a workman for a reference to a medical referee are interlocutory orders, and the costs of the proceedings in connection therewith are to be taxed accordingly.

APPEAL from Mansfield County Court.

In January, 1917, a workman, George Brown, met with an accident while in the employment of the Sherwood Colliery Co., Ld. For a time he was incapacitated, and received compensation, but later returned to work. Subsequently he suffered from an attack of nystagmus, and again he returned to work. In February, 1939, he suffered pain in his chest, which he thought was due to the original accident in 1917, and he asked his employers to agree to a reference to a medical referee. They refused, and on February 11, he was examined by his own doctor, who duly certified, in substance, that he was only fit for light work. This statement was sent to the employers, who denied that he was suffering from incapacity arising from the accident of 1917. The workman then applied to the registrar of the Mansfield County Court, under s. 11 of the Workman's Compensation Act, 1923, for a reference to a medical referee. The registrar made the order of reference, but the employers appealed from that order to the judge to refuse to allow the reference. On that appeal the employers failed, and the judge made an order dismissing the appeal, with costs. The registrar proceeded to tax the costs upon the basis that the judge's order was a final order. The employers thereupon applied to the judge for a review, alleging that the order made by the judge when he dismissed the appeal from the registrar's order of reference was an interlocutory order. The judge held that the order was final.

The employers appealed. The appeal was heard on February 13, 1940.

Neil Lawson (*F. W. Beney* with him) for the appellants. The test in a case like this is whether the order as made finally disposes of the matter in dispute between the parties. The order in this case settled nothing and disposed of no matter in dispute.

[LUXMOORE L.J. How can there be interlocutory proceedings outside an action ?]

In *In re Herbert Reeves & Co.* (1) the order was held to be final, but proceedings asking for a reference to a medical referee must, in their very nature, be interlocutory. The test of whether an appeal is final or interlocutory is the nature of the order immediately under appeal: *Bozson* v. *Altrincham Urban District Council* (2) and *Isaacs & Sons* v *Salbstein.* (3)

[SLESSER L.J. referred to *In re Frost.* (4)]

That authority and *In re Shoesmith* (5) help the appellants. The right test was not applied in the county court. The matter in dispute was what was the workman's right to compensation, and the county court proceedings did not settle that.

F. A. Sellers K.C. and *T. T. Dineen* (*T. N. Winning* with them). An order such as we are dealing with here is always treated as final. It can in no way be called interlocutory. All orders which decide the rights of the parties, though made on applications interlocutory in form, are to be treated as final orders under Order LVIII., r. 3: see The Annual Practice, 1940, p. 1265. The position here is precisely the same as in *Shubrook* v. *Tufnell.* (6) This was machinery adopted to avoid arbitration.

Neil Lawson in reply. *Shubrook* v. *Tufnell* (6) was not followed in *C. T. Cogstad & Co.* v. *H. Newsum, Sons & Co.* (7) In *In re*

(1) [1902] 2 Ch. 29.
(2) [1903] 1 K. B. 547.
(3) [1916] 2 K. B. 139.
(4) [1936] 2 All E. R. 182.
(5) [1938] 2 K. B. 637.
(6) (1882) 9 Q. B. D. 621.
(7) [1921] 2 A. C. 528.

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Croasdell and Cammell, Laird & Co., Ld. (1), it was held that an order by a divisional court setting aside an award, made under a submission to arbitration contained in an agreement, on the ground of misconduct on the part of the arbitrator, was an interlocutory and not a final order.

Cur. adv. vult.

1940. Feb. 28. SLESSER L.J. The appeal in this case under the Workmen's Compensation Acts is concerned solely with the basis on which certain costs should be taxed by the registrar in the county court, but as the decision must affect a large number of cases, we have thought fit to reserve our judgment.

The problem to be considered arises in this way. In January, 1917, a workman, George Brown, met with an accident while in the employment of the Sherwood Colliery Company, Ld. For a time he was incapacitated and received compensation; later, he returned to work. An attack of nystagmus intervened, out of which nothing now arises, but in February, 1939, he suffered pain in his chest which he thought was due to the original accident, and asked the employers to agree to a reference to a medical referee. The employers refused, and on February 11, 1939, the workman was examined by his own doctor, who duly certified, in substance, that he was only fit for light work. This statement was sent to the employers, who denied that the man was suffering from incapacity arising from the accident of 1917. Thereupon the workman applied to the registrar under s. 11 of the Workmen's Compenstion Act, 1923, for a reference to the medical referee. The registrar made the order of reference, but the employers appealed from that order to the judge to refuse to allow the reference. On that appeal the employers failed, and the judge made an order dismissing the appeal with costs. It is these costs which are the subject of the present litigation.

The registrar proceeded to tax them upon the basis that the judge's order was a final order. The employers thereupon applied to the judge for a review, alleging that the order made by the judge when he dismissed the appeal from the registrar's order of reference was an interlocutory order. The judge held that the order was final; from that decision the employers now appeal to this Court.

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(1) [1906] 2 K. B. 569.

By r. 1, sub-r. 2, of the Workmen's Compensation Rules, 1926, it is provided that these rules cited as the Consolidated Workmen's Compensation Rules (Statutory Rules and Orders), 1926, No. 448—now extant—made under the Workmen's Compensation Act, 1925, shall not apply to any case where an accident happened before January 1, 1924, so that this case is governed by the then existing rules. By s. 50, sub-s. 1, of the 1925 Act, that Act similarly is not to apply to any case where the accident happened before that date, but the enactments in the Fourth Schedule, under which the present proceedings were brought, continue to apply.

The present case must therefore be considered under para. 15 of the First Schedule of the Workmen's Compensation Act, 1906, as amended by s. 11 of the Workmen's Compensation Act, 1923, but, in my judgment, had this case been brought under ss. 17 to 19 of the Workmen's Compensation Act, 1925, and the Consolidation Rules, 1926, the result would have been the same. I arrive at this conclusion because, apart altogether from any special rules of the county court previous to 1926 stating in terms that such an order as the judge here made is interlocutory, on general principles, I think it is of an interlocutory nature.

To deal with the special rules here applicable first, r. 57 of the Workmen's Compensation Rules, 1913–1924, dealing with applications for reference to a medical referee under Sch. I., para. 15, of the Workmen's Compensation Act, 1906, provides that, where application is made by only one of the parties to a registrar and on appeal to the judge the respective authority is of opinion that "owing to the exceptional difficulty "of the case or for any other sufficient reason, the matter "ought to be settled in default of agreement by arbitration," (these words are reproduced verbatim from s. 11 of the 1923 Act, now s. 19, sub-s. 2, of the Consolidation Act, 1925, and are the provisions on which the employers here relied in their

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appeal) "shall refuse to allow the reference," and may, in such case, make such order as to the costs of the application as he shall think fit.

By sub-para. 9 of the same rule the costs of any application to the registrar—there is no mention of the costs of appeal to the judge—may be allowed by special order and in accordance with the provisions of Order XII., r. 11, of the County Court Rules so far as applicable. Order XII. of the County Court Rules, 1903–1922, deals with interlocutory proceedings, and therefore the costs of an application to the registrar are to be deemed to be interlocutory. By a parity of reasoning the appeal to the judge from such interlocutory proceedings must also be interlocutory. But, as I have said, I do not come to this conclusion solely on a consideration of the particular rules under the repealed Acts 1906 or 1923. Both under them and under ss. 17–19, the corresponding sections of the Workmen's Compensation Act, 1925, application for reference to a medical referee may take place when there is a question between the parties as to the liability to pay compensation, which, in default of agreement, may require arbitration. The need for a reference may arise either where a claim is made, which may be of an informal kind (per Lord Porter in *Dobson Ship Repairing Co., Ld.* v. *Burton* (1)), or where arbitration is pending or where application is made after weekly payment, as under s. 14 of the 1923 Act, now s. 12 of the 1925 Act: see Form 49 made under both Acts and Rules, where appropriate headings to meet all those contingencies are given. Before there is an issue as to liability, there is no right or duty in the workman to submit to medical examination. The order of the registrar or judge, deciding whether or not there shall be a reference merely determines the manner in which the medical evidence as to the physical condition of the workman shall be established; whether finally and conclusively by a certificate of the medical referee so that a judge at the arbitration cannot entertain evidence contradicting the report (*Sapcote & Sons v. Hancock* (2)), or whether the medical evidence, if the reference be refused,

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(1) [1939] A. C. 590.

(2) (1911) 4 B. W. C. C. 184.

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shall be adduced by testimony. The decision of the judge or registrar, therefore, in dismissing or allowing the reference to the referee, is no more than a determination of the manner in which evidence is to be adduced—emphatically it does not, in my judgment, finally determine the rights between the parties as to the liability to pay compensation so as to make an order thereon final.

Had the registrar or judge in the present case acquiesced in the employers' contention and so decided that the whole case should be proved before the Court, and not certified by the medical referee, it could hardly have been argued that such an order would not have been interlocutory; the fact that, in this particular case, the judge dismissed the appeal and allowed the reference to continue cannot, in my opinion, make the order a final one.

Even if the medical referee had decided in favour of the workman (which he did not) that would not conclude the case; it would still have been necessary for the workman to show that his medical condition so certified, unless admitted, was caused by an accident arising out of his employment, for which the employer was in law responsible, and that his injury had so produced incapacity as to make the employer liable to pay compensation.

The present rule as to costs under the Workmen's Compensation Rules of 1926 is r. 76, which states that where no provision as to scales of costs is made, reasonable costs may be allowed not exceeding more than is under the scales to be allowed in respect of proceedings of a like nature.

The proceedings are now regulated by County Court Rules, 1936, Order XLVII. The allowance of costs of and incidental to interlocutory applications is in the discretion of the judge or registrar if he hears the application, and by Order XLVII. where the application is interlocutory and costs are on the higher scale, no fee for counsel shall be allowed unless the judge or registrar certifies that the application is fit for counsel.

In my view, in the present proceedings the costs should be taxed on the basis that the order made by the learned judge in

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dismissing the appeal and the order made by the registrar on the application for reference were interlocutory orders. This appeal succeeds with costs.

LUXMOORE L.J. I agree that this appeal should be allowed. The question at issue relates to the taxation of the costs of an appeal to the county court judge from an order of the registrar of the Mansfield County Court, referring to a medical referee the question of the condition or fitness for employment of a workman, George Brown, who was at all material times in the employment of the Sherwood Colliery Company, Ld. The order was made under the provisions of para. 15 of the First Schedule to the Workmen's Compensation Act, 1906, and of s. 11 of the Workmen's Compensation Act, 1923, at a time when no arbitration proceedings were pending. These provisions are applicable by reason of s. 50, sub-s. 2, of the Workmen's Compensation Act, 1925. The registrar taxed the costs in question. The employers requested a review of the taxation on the ground that the taxation should have been made on the footing that the proceedings were of an interlocutory nature. The registrar held that the matter was not an interlocutory one and that the bill submitted for taxation was properly drawn. The employers in due course applied to the county court judge for a review. The county court judge upheld the order of the registrar and certified that the question raised was of general importance. He allowed the costs of the application to review to the workman on Scale C.

The employers appealed to this Court on the grounds set out in the notice of appeal. These grounds are as follows: (1.) that the judge was wrong in law in holding that an order of reference made by the registrar was not of an interlocutory nature, and (2.) that the judge was wrong in law in holding that the question whether the order of the registrar was final or interlocutory depended upon the effect of the medical referee's certificate.

It appears to me that there is an error in these reasons, for the matter dealt with in the taxation was not the costs of the order of reference made by the registrar, but those of the appeal to the judge from that order. The bill of costs submitted for taxation contains no item relating to the application to the registrar, the first item on the bill being instructions to oppose the employers' appeal to the judge from the registrar's order of reference.

In order to understand the question to be determined, it is necessary, I think, to state quite shortly the history leading up to the application to the registrar. It appears partly from the workman's application for the reference and partly from the judge's notes. On January 8, 1917, the workman was injured by an accident arising out of and in the course of his employment. The injury sustained was a fractured sternum with depression of the bone. The workman was incapacitated for a long period, but subsequently returned to his ordinary work. He left his work later on account of an attack of nystagmus, but this matter has been dealt with and there is no need to mention it further, for the workman subsequently returned to his ordinary work.

At the beginning of February, 1939, he complained of pain in his chest and alleged that it was the result of his first accident. The employers were asked to agree to the joint appointment of a medical referee, but they refused so to do. Accordingly on February 11, 1939, the workman was examined by a medical man selected by himself. This gentleman reported: "He has an obvious depression of his sternum as "the result of an accident sustained by him in 1917. The "X-ray report shows an old united fracture and depression "of this bone. In my opinion the limitation of movement "and pain in his arm are due to stretching of muscles attached "to his sternum. As to his working capacity: he is in my "opinion only fit for light work which does not entail lifting "or stretching. A night watchman might suit him." A copy of the report was sent to the employers in due course. The employers stated they were unable to agree that the workman was suffering any incapacity from the accident to his chest.

The formal application for a medical reference was made by the workman on February 22, 1939. This application was made under para. 15 of the First Schedule to the Workmen's Compensation Act, 1906, and s. 11 of the Workmen's Compensation Act, 1923. The material provisions of para. 15 are as follows: " Where a workman . . . . has been examined "by a medical practitioner selected by himself, and . . . . "the workman . . . . has within six days after such examination furnished the other" (i.e., the employer) "with a "copy of the report of that practitioner as to the workman's "condition, then, in the event of no agreement being come "to between the employer and the workman as to the workman's condition or fitness for employment, the registrar "of the county court, on application being made to the court "by both parties, may, ... refer the matter to a medical "referee." Sect. 11, sub-s. 1, of the Workmen's Compensation Act, 1923, provides that the power of the registrar of a county court under para. 15 of the First Schedule to the 1906 Act to refer a matter to a medical referee may be exercised on the application of one of the parties as well as on the application of both parties, subject, however, to appeal to the judge, and where the application is made by only one of the parties the registrar or, on appeal, the judge, if he is of opinion that, owing to the exceptional difficulty of the case, or for any other sufficient reason, the matter ought to be settled in default of agreement by arbitration, shall refuse to allow the reference.

Two points appear to be of importance: (1.) that an application for the appointment of a medical referee can be made although no other proceedings under the Act are pending; and (2.) that where the application is by one party only the registrar or the judge ought in certain circumstances to refuse to allow the reference, namely, where the tribunal is of opinion that the matter ought to be settled by arbitration in default of agreement between the parties. The latter point seems to recognize the position that arbitration proceedings may never be instituted if an order for reference to a medical referee is made.

The jurisdiction of the county court in respect of matters arising under the Workmen's Compensation Acts is purely statutory and is governed by the relevant Workmen's

Compensation Acts and the rules thereunder. Where the county court judge is to be the arbitrator his powers are derived, so far as the present case is concerned, from para. 2 of Schedule II. to the 1906 Act, which provides that in certain events an arbitration under that Act shall be by the judge of the appropriate county court "according to the procedure prescribed "by Rules of Court." The appropriate rules in the present case are the Workmen's Compensation Rules, 1913 to 1924. The rules at present in force are not applicable: see r. 1, sub-r. 2, of the Workmen's Compensation Rules, 1926.

Matters relating to applications for reference to a medical referee under para. 15 of the First Schedule to the 1906 Act are dealt with in r. 57 of the Workmen's Compensation Rules, 1913 to 1924. Para. 1 of that rule provides: "with respect "to applications to the Registrar pursuant to s. 19 of the Act "to refer any matter to a Medical Referee the following "provisions shall have effect." This sub-paragraph is followed by eight other sub-paragraphs. It is only necessary to refer to part of sub-para. 3 and to sub-para. 9. Sub-para. 3 says: "where the application is made by only one of the parties the "Registrar or on appeal the Judge if he is of opinion that owing "to the exceptional difficulty of the case or for any other "sufficient reason the matter ought to be settled in default "of agreement by arbitration shall refuse to allow the reference "and may in that case make such Order as to the costs of the "application as he shall think fit." Sub-para. 9 says: "the "costs of any application to the Registrar . . . . may be "allowed as costs in any subsequent arbitration for the "settlement of the weekly payment to be made to the workman "or where the application is made after the weekly payment "has been settled as costs in any subsequent arbitration as "to the review of such weekly payment or may be allowed by "special Order of the Judge on application in that behalf "such application to be made on not less than four days' "notice in writing and in accordance with the provisions of "Order XII., r. 11, so far as applicable."

It will be noticed that the rule is silent with regard to the costs of an appeal from the registrar to the judge.

Order XII. of the County Court Rules, 1903 to 1922 (the order referred to in r. 57), relates to interlocutory and interim orders and proceedings. Rule 11 of Order XII. relates to practice on interlocutory applications in the county court. It provides that: "Where by any statute or by these rules "any interlocutory application is expressly or by reasonable "intendment directed to be made to the Court or to the Judge "or to the Judge or Registrar or to the Registrar then subject "to the provisions of the particular statute or of the particular "rule applicable thereto and so far as the same shall not be "inconsistent therewith the following provisions shall apply." These provisions are contained in six numbered paragraphs. The material provisions are, I think, those numbered (4.) and (5.). Para. 4 provides that the allowance of the costs of and incident to the application (i.e., the interlocutory application) shall be in the discretion of the judge or registrar and no such costs shall be allowed on taxation without a special order. Para. 5 provides that no taxation of costs of interlocutory applications when allowed shall take place until the general taxation of the costs without an express order.

In my judgment r. 11 of Order XII. is incorporated in r. 57 as an instruction to the judge how the costs of an application to the registrar under para. 15 of Sch. I. of the Act of 1906 are to be dealt with, and when considered in conjunction with the direction at the beginning of the rule that the costs of application to the registrar are to be dealt with in any subsequent arbitration show with sufficient clarity that the costs of an application to the registrar where there is no subsequent arbitration are to be dealt with in the same manner as the costs of any interlocutory proceeding in the normal jurisdiction of the county court.

If, as I think is the case, the costs of the application to the registrar are directed to be treated on the same basis as the costs of an interlocutory proceeding in a county court action, I can see no ground for holding that the costs of an appeal from an order made by the registrar on such an application can properly be dealt with except on the same basis, for an appeal from an interlocutory matter must itself be interlocutory.

Rule 76 of the Workmen's Compensation Rules, 1913 to 1924, provides for costs. Para. 1 deals with costs of and incidental to an arbitration and proceedings connected therewith. Para. 4 provides that where proceedings are taken for which no provision is made by these rules or by the scales of costs, reasonable costs may be allowed in respect of such proceedings by the registrar subject to review by the judge or by special order of the judge not exceeding those which may under the scales be allowed in respect of proceedings of a like nature. The county court judge made an order with regard to the costs of the appeal to him from the registrar's order. Although I asked to be allowed to see this order, I was told there was some doubt if it had ever been drawn up, but that if it had been drawn up it was not forthcoming. The parties proceeded on the footing that the judge's order was a simple dismissal of the appeal "with costs." It was contended by counsel for the appellants that these costs can only be taxed as if the appeal to the judge was an interlocutory application. For the reasons I have already stated I think this contention is correct. Both before the county court judge and in this Court reliance was placed by the respondents' counsel upon the decision of this Court in *In re Herbert Reeves & Co.* (1) In my judgment this decision has no application to the present case, for as I have already stated, questions of costs and procedure in the county court under the Workmen's Compensation Acts are governed by those Acts, and I find in the present case that by reason of the provisions of r. 57 of the Workmen's Compensation Rules, 1913 to 1924, and the incorporation therein of Order XII., r. 11, of the County Court Rules then in force and of r. 76 of the same rules, there is a statutory provision with regard to the basis on which the costs of an application to the registrar for the appointment of a medical referee under para. 15 of the First Schedule to the 1906 Act, and s. 11, sub-s. 1, of the 1923 Act, and also of an appeal to the judge from that order, should be dealt with.

I respectfully agree with my brethren that in no event can the question whether the costs in question should be taxed on

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(1) [1902] 1 Ch. 29.

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the basis that the application was final or interlocutory depend upon the effect of the medical referee's certificate.

For these reasons I think the appeal succeeds and ought to be allowed.

GODDARD L.J. I agree that this appeal should be allowed, but I prefer to base my judgment on the broader ground dealt with by Slesser L.J. and not merely on a consideration of the rules, for if an order is essentially one of an interlocutory nature, I am not satisfied that a rule of Court could turn it into a final order. The only question that arises is whether the registrar's order referring a question to a medical referee under para. 15 of Sch. I. of the Act of 1906 and s. 11 of the Act of 1923, now replaced by s. 19 of the Act of 1925, is final or interlocutory. The order in question is and was subject to an appeal to the judge, but the appeal and the order made thereon must have the same character as the original order. The test to be applied is, does the order finally determine the rights of the parties; or, to put it in other words, does it finally dispose of the issues between them? It seems to me clear that this order does not: it merely appoints a medical referee to certify on certain matters and inferentially orders the workman to present himself for examination by the referee. If the latter certifies one way, no doubt this will conclude the matter; if the other way, it will resolve one question only, namely, that the workman is still suffering from the effects of an accident, but it will still be open to the employer to raise any defence that he has; for example, that the accident did not arise out of the employment. And in the former case it is the certificate of the referee that is conclusive, not the order. An order may, no doubt, be final, although certain things remain to be done as a consequence; an order to wind up a company or adjudicating a man bankrupt are instances, and so is an order in a redemption action. In these cases the rights of the parties are determined though results have to be worked out involving further inquiries. In the case under consideration the object of the order is merely to get the opinion on a medical question of an independent referee, thus

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avoiding a conflict of medical evidence. A further point was made that inasmuch as in this case no proceedings had been started, the order could not be interlocutory, as that term is only appropriate to an order made in the course of some legal proceedings. But the Workmen's Compensation Act provides a code of procedure of its own. This particular order can be made either when a workman makes a claim which the employer does not admit, or where the employer seeks to discontinue payments which he has been making, it may be under an award or merely by agreement.

In any case the question between the parties is whether the workman is entitled to compensation in the form of a weekly payment. That the Act has provided a form of procedure which can operate before arbitration proceedings have begun is, in my opinion, immaterial, because the order does not determine whether or not the workman is entitled to that which he seeks. It directs something to be done for the purpose of enabling the issue to be determined, which is exactly one of the functions of an interlocutory order. *In re Herbert Reeves & Co.* (1), on which the learned judge relied, is, in my opinion, in no way decisive of this case. In such a case as that the question is: Is the client entitled to the delivery of a bill? The Court answers "Yes" or "No," and thereby decides the rights of the parties; and that if a bill has to be delivered taxation may follow, no more affects the question of whether the order is final than does the fact that taxation will follow where an action is ordered to be dismissed with costs, when taxation follows as a matter of course.

In my opinion the order appealed from is wrong, and the registrar should be ordered to tax the bill on the footing that it relates to an interlocutory matter.

Appeal allowed.

Solicitors for the appellants: *Barlow, Lyde & Gilbert for Eking, Morris & Foster, Nottingham.*

Solicitors for the respondent: *Taylor, Jelf & Co., for Hopkin & Son, Mansfield.*

P. J. B.

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(1) [1902] 1 Ch. 29.

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SUNLEY (B.) AND COMPANY, LIMITED *v.* CUNARD WHITE STAR, LIMITED.

Contract—Transport of machinery by land and sea—Undertaking to ship machinery on specified steamship—Breach of contract—Delay—Consequent loss of user of machinery—Measure of damages.

By a contract between the plaintiffs and the defendants, the latter undertook to transport from Doncaster to Guernsey a machine consisting of a tractor and scraper, owned by the plaintiffs and necessary for the performance of levelling work which the plaintiffs had engaged to carry out in Guernsey. The contract provided the defendants should collect the machinery at Doncaster and convey it to Liverpool in time for shipment on their steamship *Staghound*. Owing to the failure of the defendants' sub-contractors to supply vehicles adequate for the road transport the machinery reached Liverpool too late for shipment on the *Staghound*, and had to be carried on another of the defendants' steamships, which sailed a week later. The plaintiffs therefore lost the use of the machinery for about a week. It was admitted that the defendants had committed a breach of contract, and that the plaintiffs were entitled to damages for the loss of user of their property, but the measure of damages was contested. It appeared in evidence that the machine cost 4500*l.* when new, that its working life was three years, and that during the week's delay it had done only one day's work of eight hours earning thereby 16*l.* for the plaintiffs. There was no evidence of any loss of profit to the plaintiffs under their Guernsey contract. Neither was there any direct evidence of damage due to interest on money invested being wasted, or to expenses of maintenance, or to wages thrown away:—

Held, by the Court of Appeal, that the plaintiffs were entitled to such damages as would put them pecuniarily in the same position as if the week's delay had not taken place; and that the plaintiffs should be allowed 20*l.* for the week in respect of depreciation of the machine, and 10*l.* for interest, maintenance and wages, making 30*l.* in all, less 16*l.* receipts, leaving a net sum for damages of 14*l.*

Judgment of Hallett J. [1939] 2 K. B. 791 varied.

APPEAL from the judgment of Hallett J., reported [1939] 2 K. B. 791.

In August, 1937, B. Sunley & Co., Ld. (hereinafter called "the plaintiffs"), who were public works contractors, entered into a contract with the States of Guernsey to level the site for an aerodrome for a payment of 23,385*l.* They had at Doncaster a machine consisting of a tractor and scraper essential for the performance of that levelling contract. In November, 1937, the plaintiffs entered into a contract with the Cunard White Star, Ld. (hereinafter called "the "defendants"), under which the defendants undertook for 125*l.* to collect the machine at Doncaster on November 10, 1937, to have it conveyed by lorry to Liverpool, and there to have it shipped on their steamship *Staghound*, sailing from Liverpool on November 12, 1937, and reaching Guernsey on November 15 at latest. The defendants arranged that the road transport from Doncaster to Liverpool should be done by sub-contractors, and owing to the failure of the sub-contractors to supply an adequate lorry, the machine did not arrive at Liverpool in time to be shipped on the *Staghound*, and was in fact shipped on the *Beryl*, another steamship belonging to the defendants, which did not reach Guernsey until November 22, a week later than the *Staghound* had arrived there.

The plaintiffs brought the present action against the defendants, claiming 577*l.* as damages for the week's delay in the delivery of the machine.

At the trial the defendants admitted that they had committed a breach of contract, and that the plaintiffs were entitled to damages for temporary loss of the use of the machine, but they contested the measure of damages.

The evidence went to show that the machine cost 4500*l.* when new; that its working life was about three years; and that it had done one day's work of eight hours at Doncaster during the week's delay and earned 16*l.* There was no evidence to show how old the machine was at the time of the week's delay; what work it had done up to that time; whether any overhead charges or wages had been incurred and thrown away in respect of it during that week; or whether the week's delay in forwarding it had interfered to any extent with the plaintiffs' contractual work at Guernsey. Some further evidence as to damages which was given, or which might have been but was not given, is referred to below in the judgment of the Court of Appeal.

Hallett J. was of opinion that the decision in *Clydebank*

Engineering and Shipbuilding Co. v. *Don Jose Ramos Yzquierdo y Casteneda* (1), afforded ground for the view that the doctrine to be found in *The Greta Holme* (2) and *The Mediana* (3), namely, that a plaintiff who is deprived for a time of a chattel is entitled to compensation representing the value of the use of the chattel during the detention, was not limited to claims founded upon tort, but applied also to claims founded upon contract; and that the plaintiffs were entitled to recover the true value to them, as best the Court could ascertain it, of the use of the machine as it could have been used at Guernsey during the week when they had been deprived of its use. In consideration of all the circumstances, he thought that in assessing the damages the figure he ought to arrive at was 250*l.* and he accordingly gave judgment for the plaintiffs for that amount.

The defendants appealed. The appeal was heard on February 2, 5, 1940.

A. T. Miller K.C., *A. J. Hodgson* and *Kenneth Diplock* for the defendants, appellants. The judgment appealed from is wrong because it fails to recognize the true principle of law on which damages should be assessed in such a case as this, and also because it awards an excessive sum by way of damages. The authorities no doubt establish the general principle that, where the owner of a chattel is deprived of the use of it for a time by the wrongful act of another person, he is entitled to recover by way of damages from that other person such a sum as would put him pecuniarily in the same position in which he would have been if the wrong had not been done: see *The Argentino* (4); *The Mediana* (3); *Clydebank Engineering and Shipbuilding Co.* v. *Don Jose Ramos Yzquierdo y Castaneda* (1); and Mayne on Damages, 10th ed., p. 9. These authorities do not, however, lay it down that it may be assumed without being proved that the detention of the article has caused any loss or damage to its owner. In the present case it cannot be said that the detention for a week of the profit-earning levelling machine which would be required at some stage by the plaintiffs for the carrying out of their contract at Guernsey has caused them loss or damage, in the absence of any evidence to show that their work under that contract was stopped or retarded for a week or at all. The burden is upon the plaintiffs of proving by evidence that the delay of a week in forwarding the machine has interrupted the performance of their contract, and is not upon the defendants of proving that it has not done so. The plaintiffs have produced no evidence to discharge the burden thus resting upon them. If the plaintiffs are entitled to recover any damages they are only entitled to those included in the third head of damages mentioned by Lord Wright in the case of *The Liesbosch* v. *The Edison* (1), namely, "compensation "for disturbance and loss in carrying out their contract over a "period of delay . . . . including in that loss such items "as overhead charges, expenses of staff and equipment, and "so forth thrown away, but neglecting any special loss due to "the appellants' financial position."

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(1) [1905] A. C. 6.
(2) [1897] A. C. 596.
(3) [1900] A. C. 113.
(4) (1884) 14 App. Cas. 519.

Blanco White K.C. and *Holroyd Pearce*, for the plaintiffs, respondents. The decision of Hallett J. was right in all respects. In assessing the damages to which the plaintiffs are entitled he applied the proper rule of law, and awarded a sum which is not excessive. It is not disputed that the true rule of law applicable in cases such as this is that where the owner of an article has been deprived of the use of it for a time, longer or shorter, by the wrongful act of another person, he is entitled to recover from that other person by way of damages a sum representing the use of the article to him during the time. That rule of law is well established where the wrongful act has consisted of a tort: *The Argentino* (2); and *The Greta Holme* (3); and it also applies where the wrongful act has consisted of a breach of contract: *Clydebank Engineering and Shipbuilding Co.* v. *Don Jose Ramos Yzquierdo y Castaneda.* (4) Where the article was a profit-earning article and it has been completely lost or destroyed by the wrongful act, then the measure of damages is the value of

(1) [1933] A. C. 449.
(2) 14 App. Cas. 519.
(3) [1897] A. C. 596.
(4) [1905] A. C. 6.

the article to its owner at the time and place of its loss or destruction, the particular heads of damage being those indicated by Lord Wright in *Liesbosch* (*Owners*) v. *Edison* (*Owners*) (1), the first and chief of these heads of damage being the market price of the article at the time of the loss. Here, though the machine was not totally lost or destroyed, yet the plaintiffs were deprived of the use of it for a time, and, therefore, though they could not claim the full price of the machine, yet they can by analogy claim the value of the hire of the article or of a similar substituted article for the time during which they have been deprived of the use of the article : *The Mediana* (2) ; and they can also claim compensation under the third head specified by Lord Wright for interference with their work at Guernsey. The 250*l.* awarded as damages is not excessive. The eight hours for which the machine worked during the week's detention could not be included in the period of detention, but apart from that the plaintiffs lost the work of the machine during the week and were otherwise put to expense and inconvenience. The damage was not special but general damage.

A. T. Miller K.C. in reply. The plaintiffs have not proved that the detention of the machine caused them any appreciable loss or damage by diminishing their earnings under their aerodrome contract or otherwise. That being so they are entitled to no more than a trifling amount of damages : *The Mediana.* (2) Each of the cases relied upon by the plaintiffs is, therefore, distinguishable from the present case. In *The Argentino* (3) a loss of profit-earning time was proved. In *The Mediana* (2) the place of the damaged lightship had to be taken by a substituted lightship. In the *Clydebank* case (4) the defendants were bound by contract to pay a liquidated sum as damages for delay in delivering the vessels. The damages arrived at in the Court below were excessive. They were arrived at on the basis that the machine would work the whole of each day without intermission, whereas it would work only twelve hours a day at most. By reason of the

(1) [1933] A. C. 449.
(2) [1900] A. C. 113, 117.
(3) 14 App. Cas. 519.
(4) [1905] A. C. 6.

week's rest there must have been some reduction in the rate of depreciation of the machine. The breach of contract committed by the defendants was due to the fault of their sub-contractor, and the damages should be assessed on the least burdensome footing.

1940. March 11. The considered judgment of the Court (Scott, MacKinnon and Clauson L.JJ.) was delivered as follows:

In this case the plaintiffs were public works contractors. In August, 1937, they made a contract to level an aerodrome in Guernsey for a payment of 23,385*l.* They had at Doncaster an excavating machine, weighing over 22 tons. In November, 1937, the defendants agreed for 125*l.* to transport this machine from Doncaster to Guernsey. It was to be taken on a lorry by road to Liverpool and there shipped on the steamship *Staghound*, sailing on November 12. The road transport the defendants got done by sub-contractors. Unfortunately, they sent an insufficient lorry, with the result that the machine only got to Liverpool in time for the steamship *Beryl*, sailing a week later than the *Staghound*. The plaintiffs claimed damages for this week's delay. Before action they claimed 577*l.*, and repeated that claim in their statement of claim. As 577*l.* for a week is at the rate of 30,000*l.* a year, for the use of a machine of which the cost price was 4,500*l.* and part of the plant to earn 23,385*l.* in all on this job, this claim is obviously extravagant.

The plaintiffs, having suffered a wrong, were entitled to damages, namely, such a sum as would put them pecuniarily in the position they would have been in if the wrong had not been done to them. But as it was the business of the plaintiffs to establish, if disputed, that the wrong had been done, so also it was the business of the plaintiffs to prove the amount of pecuniary loss occasioned to them. A great many witnesses were called by the plaintiffs. Unhappily, very little of their evidence was in the least relevant. It was, of course, the basis of the plaintiffs' claim that the machine had been left unused at Doncaster for the week in question. A witness, Hinchcliffe, called for the plaintiffs, said this was untrue and that it was worked for forty-six hours. As he had communicated with the defendants, the question whether the machine had been worked at Doncaster, as bearing on the honesty of the plaintiffs' claim, naturally became important. And so much evidence was directed to this issue that the plaintiffs appear to have neglected to give any material evidence to prove their real damages. Eventually the fact appeared to be that it did do one day's work at Doncaster and earned 16*l.*, and it was agreed that the plaintiffs must give credit for that sum against any claim they established. But of material evidence as to their claim there was really none. It was proved that the machine cost 4500*l.* when new and that its life was three years. There was no evidence when it was new or how old it was at the time of this week's delay, except that it stayed at work in Guernsey till August or September of the following year when it went back to England. In answer to a question by the Court, it was admitted that there was no evidence that its special work would have been accomplished any earlier had it not been a week late. If its cost was 4500*l.* and it lasted only three years, obviously its average rate of depreciation was about 29*l.* a week. There was no evidence as to wages paid to the men in charge of the machine for this week and wasted, though no doubt some slight wage expense was incurred. There was some evidence that by letting such a machine, at a later date, the plaintiffs could earn 30*l.* a week. But it was not made clear whether this was net profit, or if the plaintiffs had to pay the men's wages to work it. There is a passage in the transcript of the evidence as to this, which appears to suggest that out of the 30*l.* the plaintiffs would have to pay all the expenses of working it. What these expenses were is not clear. In the transcript there are figures which we were told were so much per hour, and one may guess that this meant for an eight hour day, for 11*s.* multiplied by eight would be 4*l.* 8*s.*, which in seven days would be a little more than the depreciation of 29*l.*, resulting from a three years' life of a 4500*l.* machine. The plaintiffs asserted that in the lost week this machine would have worked twenty-two hours a day. In fact, it never did that till March

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or April of the following year and, except for a vague declaration by one witness for the plaintiffs that the week's delay "humbugged it for the rest of the winter more or less, because we "never got the job done till the spring, you see," there was no proof of the assertion.

In these circumstances, the plaintiffs really failed to prove any facts on which their damages could be estimated. In the absence of evidence they relied on the law. And the learned judge unfortunately succumbed to the invitation to discuss a variety of cases like *The Mediana* (1) at great length. Those cases establish that when a plaintiff is deprived of the use of a chattel which he does not use for making profit he is not to be debarred from claiming as damages what during that time its use would have been worth to him, had he not been prevented from using it. But those cases are no authority for the proposition that, if the owner of a profit-earning chattel does not prove the loss he has sustained, the judge may make a guess in the dark and award him some arbitrary sum. The judgment of the learned judge is lengthy, and is occupied with an elaborate discussion of these cases, which seem to us to be quite irrelevant, except on the broad principle stated by us, which is too well known to need citation of authorities. His finding as to damages is in a few lines at the end, and is in these terms: "Upon the whole I feel that the "lump sum figure I ought to arrive at is 250*l.* That is a lump "sum figure arrived at in consideration of all the circumstances "and any attempts to analyse it by an analytical process will, "I think, be doomed to failure." When the learned judge warns us against the attempt to discover how he arrived at this figure, it is perhaps rash to act against his warning; but as 250*l.* a week is 13,000*l.* a year, it is at least startling to find that a machine that cost 4500*l.*, and was employed as only one part of the plant on a contract to earn 23,385*l.*, in all was earning 13,000*l.* a year profit, whether net or gross, or that in its three years of life this 4500*l.* machine would earn 39,000*l.*

Upon the evidence as to the damage sustained by the plaintiffs by this one week's delay, we are satisfied that 250*l.*

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(1) [1900] A. C. 113.

is wholly erroneous. There was no evidence of any loss of profit on the Guernsey contract; the only real evidence was that the capital cost of the machine had been 4500*l.* and that its life was three years. Beyond this there was nothing but the vague evidence about a hiring price of 30*l.* a day. That the judge says should be reduced to 22*l.* 10*s.* by the saving of 7*l.* 10*s.* expenses. As no Sunday work was allowed in Guernsey even this figure of 22*l.* 10*s.* multiplied by six equals 135*l.* But the judge has given 250*l.*

The sole remaining question is whether there is any evidence of actual detriment to the plaintiffs caused by the week's delay? No evidence having been given by them of any loss of profit in connection with their Guernsey contract, their only possible claim must rest on the fact that by the machine being thrown suddenly on their hands for a week they were prevented from earning its keep, and had to put up with current outgoings uncompensated by earnings. The long judgment of the learned judge is almost entirely devoted to a discussion of leading cases upon first principles of the law of damages, especially in collision cases, like *The Mediana* (1), where the claimant ship was a non-profit-earning vessel. For the present case such a discussion is unnecessary. It may be assumed—although it is not necessary for us to decide it—that, when loss of profit does not enter in as an element of loss, the measure of damages caused by a breach of contract for delay in delivery of a chattel is, under the first rule in *Hadley* v. *Baxendale* (2), not less than that in a claim in tort for temporary deprivation of the use of a chattel by the defendant's negligence.

The machine here was a chattel of commercial value, but on the facts before us there are only four possible heads of damage: (1.) depreciation which was running on, (2.) interest on the money invested which was being wasted, (3.) some trivial amount of maintenance which was no doubt involved, (4.) some expenditure of wages which were thrown away. The plaintiffs could not complain if they were refused any relief whatever on heads (2.), (3.) and (4.); for, having opened their mouth wide for a wholly illegitimate claim, they did not condescend to lead evidence on any of these three legitimate topics. The depreciation would on a pure sinking fund basis be 29*l.*: but we cannot believe that a machine exposed to such working strains in use that it will only last three years depreciates as much when idle as it does when working, and we therefore think that 20*l.* for the week is as much as ought to be allowed for depreciation; 10*l.* for interest, maintenance and wages is liberal—say 30*l.* in all—against which 16*l.* receipts must be deducted, leaving a net sum for damages of 14*l.*

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(1) [1900] A. C. 113.

(2) (1854) 9 Ex. 341.

The appeal must be allowed with costs, and the judgment below be varied by entering it for the plaintiffs for 14*l.* with such costs as that sum warrants. The claim ought to have been made in the county court.

Appeal allowed. Judgment varied.

Solicitors for appellants: *Hill, Dickinson & Co.*
Solicitors for respondents: *Munton, Morris, King & Co.*

J. R.

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OULU OSAKAYETIO *v.* ARNOLD LAVER AND COMPANY AND OTHERS.

Sale of goods—C.i.f. contract—Sellers to insure cargo against war risks—Increase in premium payable in excess of rates ruling at September 26, 1935, *to be for buyers' account—Belligerent steamship chartered by sellers—Abnormal rise in premiums for war risks insurance of belligerent ships—Buyers' liability.*

By c.i.f. contracts dated October 6 and 7, 1938, Finnish merchants contracted to sell to British buyers parcels of timber to be shipped during November, 1938, from Pateniemi to Hull. By cl. 6 of the contracts the sellers, before or as soon as tonnage was secured, were to insure the timber for the voyage to Hull against (inter alia) war risks, and any increase in premium payable for covering those risks in respect of the country of destination in excess of the rates ruling at September 26, 1935, was to be for buyers' account. The ruling rate at September 26, 1935, was threepence per 100*l.* The sellers chartered a Spanish steamship to carry the timber, and there was no evidence that any other suitable vessel was available. At the material time the ruling rate of war risks premium for all steamships other than those flying the Spanish or Greek flags was 2*s.* 6*d.* per 100*l.*, the premiums for Spanish and Greek ships being left to the discretion of individual underwriters. At the beginning of November, 1938, owing to the existence of civil war in Spain, the war risks premiums demanded for cargo in Spanish ships rose abnormally, and the sellers, fearing the rates would rise still higher, as they in fact did, insured the timber with Lloyd's underwriters at a premium of 5*l.* per cent. They claimed the difference between 3*d.* and 5*l.* per 100*l.* from the buyers, who repudiated liability :—

Held, that the contract provided for a comparison being made between like and like, i.e., between the general market rate ruling at September 26, 1935, and the general market rate ruling at the material date in 1938, and the buyers were only liable for the difference between 3*d.* and 2*s.* 6*d.* per 100*l.*

Semble, the sellers were entitled under the contract to charter a belligerent ship, but if they chose to do so they could not hold the buyers to account for the abnormal premiums asked in respect of such a vessel.

APPEAL from a decision of Atkinson J. on a Special Case stated by an arbitrator.

By three contracts on c.i.f. terms dated October 6 and 7, 1938, the respondents, Arnold Laver & Co., Ld., of Sheffield ; T. W. Allen & Sons, Ld. ; and Hollis Bros & Co., Ld., of Hull ; agreed to purchase from the appellants, Oulu Osakayetio,

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of Oulu, Finland, parcels of timber to be shipped during November, 1938, from Pateniemi to Hull. The contracts were in the same form, and the material clause, cl. 6, was as follows : " Before or as soon as tonnage is secured the marine "insurance of cargo at f.o.b. invoice value plus 10 per cent., "and of freight advance, to be covered by sellers with a first-"class company or underwriters as per Lloyd's form of policy, "together with Federation Clauses printed in margin, losses "payable in London, and including the risks covered by the "Institute War and Strike Clauses in force at the time of "attachment of the insurance. Any increase in premium "payable for covering the whole of such war risks and such "strike risks in respect of the country of destination in excess "of the rates ruling at September 26, 1935, to be for buyers' "account. Sellers' obligation under this contract to insure "against war and/or strike risks is subject to the proviso "that such insurance can be covered. Should it not be possible "to cover such insurance, or should insurance be cancelled by "underwriters, sellers shall give prompt telegraphic advice to "buyers who shall thereupon have the option of cancelling "the contract."

On October 18, 1938, the sellers' agents chartered the steamship *El Neptuno*, owned by the Spanish Republican Government, for the shipment of the timber. There was no evidence that any other suitable vessel was available. On October 26 copies of the charterparty were sent to the buyers. On October 29, the sellers, through their agents, entered into an agreement with Lloyd's underwriters for insurance to cover war risks on the timber. The relevant part of the cover note was as follows : " Wood goods in and over, including "freight advance, if any, per *El Neptuno* to Hull, including "war, etc., risks at 3*s*. 6*d*. per 100*l*., sailing on or before "November 5, 1938, held covered thereafter at scheduled "rate on date of sailing but subject to 48 hours' notice of "cancelment unless sailing on or before November 28, 1938."

Agreed minimum rates for insuring against war risks were fixed by the Rates Committee of Company and Lloyd's Underwriters, but from October 6, 1937, Spanish and Greek steamships were excluded from these fixed rates, and premiums on cargoes carried in the ships of those two nations were left to the discretion of individual underwriters. The war risks rate on cargo from Baltic ports to the United Kingdom ruling at September 26, 1935, was 3*d*. per 100*l*. On October 29, 1938, the schedule rate was 2*s*. 6*d*. per 100*l*., and that remained the schedule rate at all material dates for vessels other than those flying the Greek or Spanish flag.

On November 2, 1938, the steamship *Cantabria*, a cargo vessel owned by the Spanish Republican Government, was attacked by a Spanish Insurgent auxiliary cruiser and sunk by gun-fire in the North Sea, off Cromer. As a result of this incident war risk insurance premiums on Spanish Government vessels rose substantially, and ultimately the sellers, being advised by their agents that rates were likely to rise still higher, agreed with the underwriters for war risk insurance cover at a premium of 5*l*. per 100*l*. The *El Neptuno* sailed on November 12, by which time the rate for Spanish vessels had risen to 10 guineas.

The sellers claimed to be entitled to recover from the buyers the difference between the war risk premium of 3*d*. per 100*l*. ruling at September 26, 1935, and the premium of 5*l*. per 100*l*. The buyers repudiated liability, and the matter in dispute was by agreement referred to arbitration. The arbitrator held that the buyers were liable to pay the full excess of 4*l*. 19*s*. 9*d*. per 100*l*., but stated his award in the form of a Special Case for the opinion of the Court.

Atkinson J., before whom the Special Case was heard on October 17, 1939, held that the buyers were only liable for the difference between 3*d*. and 2*s*. 6*d*. per 100*l*. In the course of his judgment he said:—

"The question is whether the sellers were entitled to "charter a ship belonging to a belligerent who was "notoriously much weaker at sea than his enemy, and to "cover goods for a premium to be fixed at the discretion "of the underwriters on an unknown date of sailing. The "sellers contended that they were entitled to ship by any "steamer they liked. I doubt very much whether they "were entitled to ship by a steamer actually belonging to a "belligerent, or by any steamer which, by reason of "circumstances peculiar to itself or its flag, made the burden "of insurance against war risks heavy beyond the ordinary "schedule rates, or, at any rate, to select such a ship except "at their own cost as to excess premiums. It is implicit "in the contract that the sellers should act reasonably where "they are to take a step which will impose a burden on the "other contracting party. I think they were bound to take "all reasonable steps to make that burden as light as they "properly could, and I do not think it was reasonable to "charter a ship which belonged to a state actually at war. "In my view, there is an even greater difficulty in the way "of the sellers. What was their obligation as to insuring? "As soon as tonnage had been secured insurance on the "cargo was to be effected by them with underwriters, and any "increase of premium payable for cover in excess of rates "ruling at September 26, 1935, was to be for buyers' account. "I think this obligation contemplates an insurance effected "on or about October 18, at a premium to be then fixed, "and fixed by reference to schedule rates then payable. No "point is made by the buyers as to the delay in covering, "but, be that as it may, certainly, in my view, the contract "did not contemplate or permit insurance at a premium "which was not then fixed, but was to be left at the discretion "of the underwriters on the date of sailing. Such a bargain "would defeat the whole purpose of the obligation to insure "as soon as tonnage was obtained. It would be a gamble "at the buyers' risk, the very thing which the buyers were "seeking, and the sellers contracting, as I think, to avoid. "An interpretation which permitted such a bargain would give "no effect to the words 'payable for covering,' which I think "mean 'payable at the time of obtaining cover and in "'consideration of the cover.' Then arises the question: "What was the effect of the cover in fact obtained? Here "the sellers are in a dilemma. If, as the buyers say, the "cover note meant what it said, the underwriters thereby "agreed to cover after November 5 at the schedule rate

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"on date of sailing, and, if the sellers had held the underwriters to their bargain, only 2s. 6d. would have been "payable. I think that the agreed statement of facts makes "it clear that there was only one schedule, i.e., the schedule "agreed by the Rates Committee, and that premiums on "cargoes in Spanish steamships were left to the discretion of "underwriters. There was no such thing as a special schedule "applicable to Spanish ships, but, of course, there was "nothing to prevent underwriters from agreeing to insure "cargoes in Spanish ships at the general schedule rates. "The buyers contend that that is what the underwriters in "fact did. If the buyers are right in this contention, the "sellers must fail to recover more than 2s. 6d. The same "result follows, I think, if the sellers are right in their "contention as to the meaning of the cover note. They say "' schedule rate ' did not refer to the one and only schedule, "namely, that fixed by the Rates Committee, but meant the "rate which underwriters were in fact asking in their discretion "on the date of sailing. If they are right in that contention, "I think that the cover effected was not authorized by the "contract, even if the sellers were entitled to ship by a Spanish "ship."

The sellers appealed. The appeal was heard on March 14, 1940.

St. John Field K.C. and *H. G. Robertson* for the sellers. The buyers, to avoid liability for the increase in premiums which is claimed, must establish either that the sellers broke their contract by chartering a belligerent ship, or else that they performed it in an unreasonable way. The obligation of the sellers was to charter a ship and then to insure the cargo against (inter alia) war risks. The contract does not specifically exclude Spanish ships or any other class of ship, and, if the sellers chartered a Spanish ship, it was not their fault if, for some reason or other, the insurance rates suddenly rose abnormally. It is impossible to read into this contract, in order to give it business efficacy, an implication that the sellers must not charter a vessel which is likely to become

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unduly costly in respect of insurance against war risks. Mere belligerency, as such, cannot be a reason for not chartering a particular ship under a c.i.f. contract. It is only in the event of insurance being impossible, or the insurers cancelling the insurance, that it becomes the duty of the sellers to notify the buyers, who then have the option of cancelling the contract. In this case, obviously, insurance was not impossible, and in view of the probability that rates would rise still higher the sellers acted reasonably in covering at the rate they did.

F. A. Sellers K.C. and *R. E. Gething* for the respondents, were not called on to argue.

Slesser L.J., having recited the facts and read the relevant parts of the contract and of the cover note, continued: In my view, the whole question has to be determined on a proper interpretation of this contract and more particularly of cl. 6, in which I find some indication of what was the intention of the parties. The sellers' right, unusually, to put these expenses of premiums on to buyers' account is stated in language which must be carefully considered. It says: "Any "increase in premium payable for covering the whole of such "war risks and such strike risks in respect of the country "of destination in excess of the rates ruling at September 26, "1935, to be for buyers' account." If the case cannot be brought within those words, either expressly or by reasonable implication, the claim must fail.

In my view, cl. 6 contemplates a comparison between like and like, between the rates ruling at September 26, 1935, and those ruling at the time contemplated in the contract, but in both cases what has to be considered are the ruling rates, or, as Atkinson J. calls them, the schedule rates, that is, the normal market rates. There is no doubt that the ordinary ruling rate at the material date in 1938 would be for war risks on cargo from Baltic ports and would not include any particular kind of steamships which had been removed, for one reason or another, from the ruling rate. Such steamships were, after October 6, 1937, Spanish and Greek steamships. In other words, after October 6, 1937, there was no rate ruling which could have applied to a Spanish or a Greek steamship, and, in my view, the 3*s*. 6*d*. on the cover note is not comparable to the 3*d*. which was the war risk rate ruling at September 26, 1935, because the one is in a different category from the other. The 3*d*. was the prevailing ruling rate, while the 3*s*. 6*d*. was an exceptional rate fixed by discretion and not by rule, or schedule, or general category.

The right way, therefore, of looking at this matter is that it was never intended by the parties, having regard to the words used in these agreements, that any such rate as 3*s*. 6*d*. should be comparable to 3*d*. The prevailing rate at the time when the comparison had to be made was 2*s*. 6*d*., and not 3*s*. 6*d*. The fact that later on, by reason of the sinking of the *Cantabria*, the discrepancy became even more marked, does not, in my view, affect the principle which has here to be considered. It happened that the actual agreement made was for 5*l*. per cent. premium, but, in my view, equally, if the rate had remained at 3*s*. 6d., the excess could not have been ascertained by reference to the rate ruling at September 26, 1935.

That view, which I derive from the language of cl. 6, seems to me consistent with good sense. I cannot think that it was the intention of the parties that the buyers should be entirely in jeopardy by reason of the sellers being able to choose any ship of any quality, flag, or condition they liked, and then say : " It is possible to cover the insurance " (albeit at an extravagant rate), in which case there would be no obligation on the sellers to give prompt telegraphic advice to the buyers, who would then have the option of cancelling the contract. In such a case all the unnecessary and swollen excess would be for the buyers' account. That is a very improbable bargain between the parties, and it is one which I should be very reluctant to accept.

For the reasons which I have stated it is not necessary here to invoke the principle of *The Moorcock* (1), or of *Hamlyn & Co.* v. *Wood & Co.* (2), to import terms into the contract to give it commercial efficacy. The actual language of the contract requires the comparison of a ruling rate with a ruling

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(1) (1889) 14 P. D. 64.

(2) [1891] 2 Q. B. 488.

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rate, and, in so far as there was no ruling rate for Spanish ships at the time the comparison was said to have been made, cl. 6 of the contract does not apply, and, therefore, the claim must fail.

I would add, since, in my view, Atkinson J. was mistaken in one of the ways in which he looked at this case, that the question of the reasonableness or propriety of chartering a Spanish ship has nothing to do with the matter. It may well be that under this contract the sellers were entitled to charter a belligerent ship. The question which I have to consider is whether, having chartered a belligerent ship, they have established a right to hold the buyers to account for the difference between the rate which they paid for insurance on chartering such a ship and the rate prevailing at September 26, 1935? I think that they had no such right, and that Atkinson J. should be upheld in holding that the arbitrator was wrong in the view to which he came.

Luxmoore L.J. I agree that this appeal must fail. The question to be determined is whether the sellers can recover from the buyers the difference between the sum actually paid by the sellers for insurance against war risks of goods carried in a Spanish ship chartered by them and the general market rate which was ruling at September 26, 1935.

The sellers elected to charter a Spanish ship, and I do not think that there is any reason to suggest that they had no right to do so. There was at the date of the insurance no general market rate applying to Spanish ships, and the answer to the question which has to be determined depends entirely on the construction to be placed on the contract between the parties.

Clause 6 of the special conditions included in the contract provides that the sellers shall insure against war risks the goods which are the subject of the contract, and, although it is a c.i.f. contract, it contains the unusual provision that in respect of part of the insurance the buyers shall be responsible. The material part of the clause is as follows: "Any increase in "premium payable for covering the whole of such war risks "and such strike risks in respect of the country of destination

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"in excess of the rates ruling at September 26, 1935, to be for "buyers' account." Does that mean any increase in premium which the sellers may choose to pay, no matter whether it is in excess or otherwise of the general market rate, or is it intended to compare like with like? At the date of the insurance there was a general market rate of 2*s.* 6*d.* per cent. for war risks insurance from Baltic ports in respect of all ships except Greek and Spanish ships. It seems to me that, when it is appreciated that what has to be paid is an increase in premium at the date of insurance over the general market rate of 3*d.* which was existing on September 26, 1935, it is plain that the rate to be considered is the general market rate ruling at the later date as opposed to any special or particular rate of premium required to be paid in a particular case or class of cases.

Goddard L.J. I will only add a few words because, although I agree with the decision of Atkinson J., I am differing from an arbitrator of great experience in this class of case, and also because I do not agree with all the reasons, or doubts, expressed by Atkinson J. I do not agree, for instance, that there was either any breach of contract, or anything unreasonable, in the sellers chartering a Spanish ship. It was open to them to charter any ship they liked. What has to be considered is whether they, the sellers under a c.i.f. contract, are entitled to put on the buyers part of the insurance premiums, which the sellers would ordinarily have to pay. That depends entirely on the construction of a few words in cl. 6 of the contract. I prefer to base my judgment simply on the fact that I think the words "Any increase in "premium" must mean "Any increase in the ruling or "market rate of premium for war risks"—that is to say, for war risks in general. I find support for that not only in the words of the clause, which are "in excess of the rates "ruling at September 26, 1935," and the necessity of comparing like with like, as my Lord puts it, but also because it would seem to be the only reasonable construction to put on these words that they are not apt to cover the case of a special rate of premium quoted by reason of something peculiar to the particular ship selected by the sellers or the particular class of ships to which that ship may belong. The ruling or market rate of premium in this case was 2*s*. 6*d*. A particular rate was quoted, but there was no ruling rate for this Spanish ship, because of the class to which she belonged. I do not think that that is covered by the words of cl. 6 which, in my view, refer to the market rate only.

Appeal dismissed.

Solicitors for appellants: *Slaughter & May.*

Solicitors for respondents: *Pritchard, Sons, Partington & Holland, for Andrew M. Jackson & Co., Hull.*

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YOUNGS *v.* YOUNGS.

BAKER, CLAIMANT.

Bill of sale—Registration—Sale of goods—Man to domestic servant—Receipt for purchase money—Possession—Apparent possession—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31), *ss.* 4, 8.

A man sold certain furniture in his house to a woman who was living in the house as his housekeeper. He gave her a receipt for the money to which was attached an inventory of the furniture that was sold. The furniture was not moved from the house and continued to be used by the man. The furniture was seized by the sheriff under a writ of fieri facias to answer a claim by an execution creditor of the man—which was a claim by his wife for alimony. On the trial of an interpleader issue the county court judge found that the man had no intention to part with the possession of the furniture to his domestic servant, and that she used the furniture only in so far as she was a member of the man's household; that the receipt with the inventory attached was a bill of sale and being unregistered was void as against the sheriff seizing the goods and that therefore the claim of the claimant to the goods failed. On appeal:—

Held, that there was evidence upon which the county court judge could so hold.

Ramsay v. *Margrett* [1894] 2 Q. B. 18 distinguished.

Observations by Goddard L.J. as to the application of the doctrine of *Ramsay* v. *Margrett* to a case where a woman was living with a man as his mistress.

APPEAL from a decision of the judge of the Willesden County Court on the trial of an interpleader issue.

The claimant, Miss I. M. P. Baker, was, prior to December, 1937, employed by Mr. and Mrs. Youngs, at their baker's shop, partly as a domestic servant and partly as an assistant in the shop. She left their employment in December, 1937.

In February, 1938, the wife, Mrs. Belinda Youngs, left her husband, Mr. Walter Cyril Youngs.

In April, 1938, the claimant returned and lived with the husband as his housekeeper.

In December, 1938, the wife brought a petition for divorce against her husband in which she alleged that he had committed adultery with the claimant.

On March 2, 1939, the husband sold some of the furniture in his house to the claimant for the sum of 50*l*. 10*s*., and he gave to the claimant a receipt for the money, to which was attached an inventory of the furniture that had been sold to the claimant.

On April 24, 1939, the wife obtained in the divorce suit an order for alimony against her husband at the rate of 3*l.* per week.

On May 18, 1939, the wife obtained a decree nisi for a divorce.

On June 18, 1939, the husband sold a second lot of furniture in his house to the claimant for the sum of 39*l.*, and again gave the claimant a receipt for the money to which was attached an inventory of the furniture sold to the claimant. These receipts were not registered as bills of sale. The furniture, the subject of the two transactions, was never moved from the house, and was still used by the husband and his daughter for their own use.

As the husband did not comply with the order of the Divorce Court for alimony a writ of fieri facias was issued on June 30, and on July 18 the sheriff seized the furniture in the husband's house under that writ.

The claimant claimed the goods seized as her property, and an interpleader issue was directed to be tried.

On the trial of that issue the county court judge held that the husband had not given possession of the furniture to the claimant, and that he had no intention of doing so, and that the furniture was still being used by the husband and his daughter, and that the claimant used the furniture only in so far as she was a member of the household. The county court judge held that the two receipts which were given by the husband to the claimant were bills of sale which were void against the sheriff seizing the goods as they had not been registered as bills of sale. He accordingly dismissed the claimant's claim for the goods.

The claimant appealed.

H. E. Park for the appellant (claimant). These goods were in the apparent possession of the claimant within the meaning of s. 8 of the Bills of Sale Act, 1878, and therefore were not liable to be taken in execution by the sheriff. In *Ramsay*

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v. *Margrett* (1) a wife had agreed to buy from her husband some furniture and other personal chattels belonging to him which were in the house in which she lived with him. There was no formal delivery of the furniture by the husband to the wife which remained in the house where they lived. Some of the furniture was taken in execution by a judgment creditor of the husband. It was held by the Court of Appeal that the wife had sufficient possession of the goods to take the case out of the Bills of Sale Act, 1878, for the situation of the goods being consistent with their being in the possession of either the husband or the wife, the law would attribute the possession to the wife who had the legal title. That authority directly applies in the present case. It is stated in Littleton on Tenures, s. 701, that "where two "be in one house, or other tenements, and the one claimeth "by one title, and the other by another title, the law "shall adjudge him in possession that hath right to have "possession of the same tenements." It is stated in Pollock and Wright on Possession, p. 24: "Where possession in fact is "undetermined, possession in law follows the right to possess."

That doctrine is not limited to the case of a husband and wife. In *French* v. *Gething* (2) Atkin L.J. said that *Ramsay* v. *Margrett* (1) "decided that, where husband and wife are "living together in the same house and the husband gives a "bill of sale to his wife, not only are the goods in the possession "of the wife and no longer in the possession of the husband, "they are also in the apparent possession of the wife and no "longer in the apparent possession of the husband." But Atkin L.J. went on to put by way of illustration this case: "If there are three men in a boat belonging to one of them, the "boat is in the possession of the owner and not in the possession "of the two visitors or either of them, and is in his apparent "possession and not in that of them or either of them; and if "the owner sells the boat to one of the visitors, intending to "pass the property in it to him, then possession and apparent "possession are in the purchaser and not in the former owner." Atkin L.J. also pointed out that "the contract" in s. 4 of the

(1) [1894] 2 Q. B. 18.

(2) [1922] 1 K. B. 236, 246, 247, 248.

Act of 1878 "is between the occupier of a house and some "person outside to whom symbolic possession of the goods "in the house has been given; not between one occupant of "the house and another occupant of the house to whom actual "possession of the goods has been given." From April, 1938, the claimant had been living in the house as the mistress of the husband, and the same reasons would apply to her as to a wife. In *Antoniadi* v. *Smith* (1) the principle was applied to a case where a mother-in-law and a son-in-law lived in the same house and where the son-in-law granted a bill of sale over furniture in the house to his mother-in-law. When the furniture was subsequently taken in execution on a judgment against the son-in-law it was held that the mother-in-law was entitled to claim the goods as against the execution creditor. On any view these documents, consisting of receipts with inventory of the furniture attached, were not assurances of personal chattels. The county court judge had no evidence on which he could hold that they were bills of sale.

[Goddard L.J. referred to *Fleetwood-Hesketh* v. *Commissioners of Inland Revenue.* (2)]

Norman E. Wiggins for the respondent, the plaintiff. At all the material dates when these transactions took place the claimant was living with the husband as his housekeeper, receiving wages of 2*l.* a week. There is no evidence that she was living with him as his mistress. The only question is whether the furniture was in the apparent possession of the husband at the time of the seizure within the meaning of s. 8 of the Bills of Sale Act. He apparently sold it to his housekeeper, but it remained in his possession and therefore was in his apparent possession. The cases cited such as *Ramsay* v. *Margrett* (3) only apply to transactions between a husband and wife and do not apply to transactions between a man and his domestic servant. The section makes it clear what apparent possession means. The observations of Atkin L.J. in *French* v. *Gething* (4) in so far as they went outside the relationship of husband and wife are obiter. The claimant only used the

(1) [1901] 2 K. B. 589.
(2) [1936] 1 K. B. 351.
(3) [1894] 2 Q. B. 18.
(4) [1922] 1 K. B. 236.

furniture in a limited sense in her capacity as housekeeper. [He was stopped.]

H. E. Park replied.

SLESSER L.J. In this appeal Mrs. Belinda Youngs, who was the petitioner in a divorce suit against her husband, Walter Cyril Youngs, on April 24, 1939, obtained an order for alimony, and in respect of that order she had a claim against her husband. This claim being unsatisfied, goods and chattels were seized by the sheriff of the county of Middlesex under a writ of fieri facias. The goods consisted, amongst other things, of certain furniture worth, it is said, respectively 50*l.* 10*s.* and 39*l.* The claimant, Miss I. M. P. Baker, alleged that the sheriff wrongfully seized those goods in that they were her property, and an interpleader issue was directed to determine that question.

The claimant had been employed until December, 1937, partly as a domestic servant at the home of the judgment debtor, Walter Cyril Youngs, and his wife, who were then living together, and partly as an assistant in a shop conducted by them. In February, 1938, the wife left her husband, and later in that year their young daughter returned to him, and at the same time the claimant returned and acted as the husband's housekeeper.

In March, 1939, the husband was in financial difficulties, and said that he wanted to sell his furniture. The claimant thereupon bought his furniture in two lots, on March 2, 1939, as to 50*l.* 10*s.*, and on June 18, 1939, as to 39*l.* for the second lot of furniture. It was suggested that the purchase of the furniture by the claimant was not a genuine purchase. Evidence was given as to the borrowing by the claimant of money from friends with which to buy the furniture. The county court judge came to the conclusion that the claimant did buy the furniture from the husband for the sums and on the dates mentioned, and that they were genuine transactions, and not done with intent to defraud the creditors within the meaning of the Law of Property Act, 1925, s. 172, and the case must be dealt with upon that basis.

What is urged on behalf of the execution creditor, the wife, is this: It is said that this transaction constituted a bill of sale within the meaning of the Bills of Sale Act, 1878, s. 4, in that a bill of sale includes "an assurance of personal chattels"; and that the taking of those receipts of March 2, 1939, and June 18, 1939, both setting out the furniture bought and both having this subscription: "Received" the respective sums "from I. M. P. Baker for the above effects," signed by the husband, constituted bills of sale. It is not seriously disputed that it was by reason of those receipts that the claimant was willing to purchase these goods, and that she received the necessary assurances of the personal chattels, and that the goods, therefore, were passed by the bills of sale. If it be the right view that those documents constitute bills of sale, it is conceded that they have not been registered, and, if they have not been registered they are void as unregistered bills of sale against the sheriff's officer and other persons seizing the goods under the Bills of Sale Act, 1878, s. 8, if after the lapse of seven days "they are in the possession or "apparent possession" of the person making such bills of sale.

It is said that these goods were not "in the possession or "apparent possession" of the person making the bill of sale. It is said that the right view is that they are in the apparent possession of the claimant. On that point we have been referred to *Ramsay* v. *Margrett* (1), which really follows the old principles of law on the general law of possession, namely, that where the possession of goods may be in one person or another, and the matter of possession is doubtful, then the law will attribute possession to the person who has the legal title. *Ramsay* v. *Margrett* (1), and the later case of *French* v. *Gething* (2), which was also cited to us, are cases where it was doubtful, apart from the question of title, whether the possession was in the husband or in the wife. In a later case of *Antoniadi* v. *Smith* (3) a similar problem arose with regard to a son-in-law and a mother-in-law. However, the county court judge has found in the present case that there was no intention on the part of the husband to part with the possession of the

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(1) [1894] 2 Q. B. 18.
(2) [1922] 1 K. B. 236.
(3) [1901] 2 K. B. 589.

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furniture to the claimant, and, in my opinion, there is evidence on which he could come to that conclusion. He has found, in the first place, that the claimant was at all times a domestic servant in the house. Though it might be possible to draw certain inferences against her morality—which I hesitate to do—owing to the fact that she was the woman with whom adultery was charged in the undefended divorce case, in which a decree was granted, nevertheless the county court judge has not found that she occupied that anomalous position, but has found that at all material times she was a servant or housekeeper. In the second place he has found that the furniture, which was the subject of these bills of sale, which has never been moved from the house, is still being used by the husband for himself and his daughter, and that the claimant uses the furniture only in so far as she is in the house as a member of the household. That is to say, being a servant or housekeeper, she does not use the furniture, which consists of the normal furniture of a house, the bedroom suite, the dining room suite, bookcases, dining trolley and kitchen utensils, as of right, but so much as she does use as a servant. This is not one of the cases where it is doubtful whether the apparent possession is in A or B, and where it is said that possession follows the title. It is a case where the county court judge has found as a fact that the apparent possession is in the execution debtor, the husband. If he has so found, then the matter falls sufficiently within the ambit of the Bills of Sale Act, 1878, s. 8. These being bills of sale and unregistered, are void as against the sheriff's officer, and it follows, therefore, that this appeal fails.

MacKinnon L.J. I agree. When the writ of fieri facias was issued, and execution put in by the wife, the sheriff's officer seized certain furniture. The claimant asserted that the furniture belonged to her. The county court judge found that the husband did sell to her the furniture by two sales on March 2, 1939, and on June 18, 1939, as was shown by two receipts and inventories of those dates, signed by him. Then the execution creditor says: Well that may be so; but if those facts are established, then I rely on the Bills of Sale Act, 1878, ss. 4 and 8, and say that those receipts constitute bills of sale, and they are not registered; and the chattels "remained in the possession of the grantor of those bills of "sale." In reply to that contention the claimant seeks to rely on the principle laid down in *Ramsay* v. *Margrett* (1) as regards the first point, whether the document in question constituted a bill of sale within the definition of the Bills of Sale Act, 1878, s. 4. The gist of that decision is, that if a document is intended by the parties to it to be a part of the bargain to pass the property in the goods, then, whatever the form of the document may be, even if it be only a simple receipt for the purchase money, it is by s. 4 to be deemed to be a bill of sale, though it is not so in fact. However, if the document is not intended to be part of the bargain to pass the property in the goods—if the bargain is complete without it, so that the property passes independently of it—then it is not to be deemed to be that which it is not in fact—a bill of sale. In this case, as in *Ramsay* v. *Margrett* (1) the claimant argues that these documents fall within that second category, but the county court judge has found in the terms of the distinction laid down in *Ramsay* v. *Margrett* (1): "I come to the conclusion that "the receipts were intended to be part of the transaction in "passing the property." And further: "I come to the con-"clusion that the receipts in question were given as assurances "of title." There was ample evidence on which the county court judge could come to that decision. If so, on that head this case is the opposite to that which was decided in *Ramsay* v. *Margrett.* (1)

The other point is whether the goods remained in the possession of the grantor of these bills of sale. *Ramsay* v. *Margrett* (1) was a case of a sale by a husband to his wife, who were living together in the same house. As I understand it, it was held by the judges there, as was pointed out by Scrutton L.J. in the later case of *French* v. *Gething* (2), that when a husband and wife are living together in a house, the furniture in the house is in the possession or apparent possession of either or both of them. If it is a question as to whose property it is, one may have to go into the question of title to see who is really in possession under the old doctrine which has been cited from Littleton on Tenures, s. 701. In this case there is nothing of that sort. These persons are living in the same house, but one is the owner and master of the house and the other up to September, 1939, was, on her own evidence, in the house as housekeeper and servant, receiving *2l.* per week as wages. There is no more apparent possession of the furniture by her than there would be apparent possession of furniture in the house by any servant living permanently in the house. Therefore *Ramsay* v. *Margrett* (1) is not a binding authority in this case. The county court judge was not bound to hold that this furniture was in the possession either of the husband or of the claimant, and he finds on the facts, that the possession of the furniture never did leave the former. The furniture has never been moved from the house; it is still being used by the husband for himself and his daughter, and the claimant uses it only so far as she is a member of the household. The county court judge says: "I was of opinion that possession of the "furniture was not given by Mr. Youngs to the claimant." In those circumstances there was again a finding of fact for which there was evidence, and on that the county court judge held that the claimant's claim was unfounded. That being so, I think that the appeal against his decision entirely fails.

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(1) [1894] 2 Q. B. 18.

(2) [1922] 1 K. B. 236, 245.

GODDARD L.J. I agree. We have heard an interesting argument by counsel for the claimant. It in no way detracts from the value of his argument if I say that I myself am glad that I cannot accede to it, because I cannot imagine any case in which it would be more proper that the Bills of Sale Act, 1878, should apply than this case. It is just the sort of case which, in my opinion, illustrates the mischief which the Act was intended to prevent.

Two points have been taken, one under s. 4 and the other under s. 8. With regard to s. 4, it is true that an inventory of goods with a receipt attached is a bill of sale only if the document is intended to form part of the transaction between the parties. This is a question of fact, and in my opinion in this case it is perfectly clear that this document was intended by both parties, certainly by the grantor, to be an assurance of title to the claimant. It is clear from the man's own evidence that what he was doing was either, on the more charitable view, raising money to pay his creditors, or on the less charitable, trying to put his furniture beyond their reach. In either case, as he was selling to his housekeeper, the last thing that he would desire would be that the furniture which he was using, although he had been paid for it by her, should be liable to execution, and I have not the least doubt but that he and the claimant intended that there should be a document which could be shown to the sheriff proving that the property had been transferred to the claimant. There was ample evidence here, in my opinion, on which the county court judge could find as he did on this point.

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(1) [1894] 2 Q. B. 18.

As to s. 8, I, of course, fully accept the decision in *Ramsay* v. *Margrett* (1) and in *French* v. *Gething*. (2) Those cases show that when a husband and wife are living together, the Bills of Sale Act, 1878, has no application to transactions between them. As Davey L.J. said in the former case (3): "She "[the claimant] purchased from her husband goods which "were then in their common use in the conjugal domicil, "and the goods remained there after the purchase." He then cited the passage from Littleton's Tenures which has been referred to and which I need not read again. But it is not because of the existence of a marriage tie that the section does not apply. It is the existence of what I may call a common establishment that is the important factor. This is shown by *Antoniadi* v. *Smith* (4) and by the illustration given by Atkin L.J. in *French* v. *Gething* (5) of two friends sharing a boat. So I think the cases show that where a man is living openly with a mistress, instead of a wife, the doctrine of *Ramsay* v. *Margrett* (1) would apply to transactions between

3 friends

(1) [1894] 2 Q. B. 18.
(2) [1922] 1 K. B. 236.
(3) [1894] 2 Q. B. 27.
(4) [1901] 2 K. B. 589.
(5) [1922] 1 K. B. 236, 247.

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them whereby one sells to the other the contents of the house in which they are living. But the doctrine cannot, in my opinion, apply to a transaction between a man and his domestic servant, even though he may have misconducted himself with her. In the present case the claimant was in his house for eleven months as a housekeeper, and received wages as such. It is impossible to say that a servant has a common use of the furniture in the house in which she is living with her master in the sense in which that expression is used by Davey L.J. in *Ramsay* v. *Margrett* (1), or that it comes within the class of cases which is contemplated by the passage in Littleton on Tenures, s. 701: It is perfectly true that my servant has the use of the furniture which I provide for his or her bedroom, or for his or her sitting room, and has the use of the kitchen utensils, and so forth, but he or she has not a common use with me; he or she is using them as my servant. Therefore, it seems to me that it would be carrying the doctrine of *Ramsay* v. *Margrett* (1) to an extravagant length to say that if a man sells his household furniture to his housemaid, or to his butler, and things go on exactly as before, the property ceases to be in the apparent possession of the master merely because the butler or housekeeper or servant remains in the house and goes on rendering him services. It is entirely different from the case where a mother-in-law and son-in-law, or a mother and son, may be living in the same house, or where two friends may be sharing a common establishment. I think the county court judge was well justified in this case in finding that the goods were still in the apparent possession of the husband, the execution debtor. Therefore this appeal fails and must be dismissed.

Appeal dismissed.

Solicitor for appellant (claimant): *Samuel Coleman.*

Solicitors for respondent (execution creditor): *Saville, Bailey & Scott.*

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(1) [1894] 2 Q. B. 18.

R. F. S.

GOODBARNE *v.* BUCK.

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Feb. 22, 23.

Insurance—Motor-car—Third-party liability—Registration of car in brother's name to avoid execution—Voidable policy—Avoidance of policy after accident—Whether brother liable for "causing" car to be used when no policy in force—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 35.

The defendant W. E. B. required a motor-van for use in his business. The money for the purchase of the van was provided by his brother H. A. B., and to avoid the possibility of the van being taken in execution by a judgment creditor of W. E. B. it was registered in the name of H. A. B. A proposal form for insurance was filled up by W. E. B. in which H. A. B. was described as the owner of the car and other false statements were made. A policy of insurance was issued and after W. E. B. had been involved in an accident causing the death of a third party the insurance company obtained judgment against both brothers declaring that they were entitled to avoid the policy for non-disclosure and misrepresentation. The present action was brought by the widow and administratrix of the deceased man claiming damages against both brothers under the Law Reform (Miscellaneous Provisions) Act, 1934, and also under Lord Campbell's Act. W. E. B.'s liability was admitted. The claim against H. A. B. was based on the allegation that W. E. B. was a person of no substance and unable to satisfy any judgment against him and that H. A. B., in breach of his statutory duty under the Road Traffic Acts, had caused or permitted W. E. B. to drive the van while there was not in force in relation to the said driving a proper policy of insurance. Hilbery J. held that H. A. B. did not cause or permit W. E. B. to drive the van without there being in force a proper policy of insurance, and that therefore the claim against H. A. B. failed. On appeal:—

Held, that the question whether H. A. B. was liable under the principle laid down in *Monk* v. *Warbey* [1935] 1 K. B. 75 to pay the damage sustained by the plaintiff through the negligent driving of the van by W. E. B. depended upon whether H. A. B. could have been successfully prosecuted under s. 35 of the Road Traffic Act, 1930, for having caused or permitted W. E. B. to use the van on the road without there being in force any proper policy of insurance. In order to make a person liable for permitting another person to use a motor vehicle, he must be in a position to forbid that other person from using the motor vehicle. Only the owner of a motor vehicle could do that, and H. A. B. never was the owner of the van, and therefore he could not be made liable for permitting another person to use a motor vehicle on the road without a proper policy of insurance being in existence. Neither could he be successfully charged with causing W. E. B. to use the vehicle on the road without there being in force an effective policy

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of insurance as all he had done was to stand by knowing that W. E. B. was putting forward inaccurate statements to the insurance company in order to obtain a policy of insurance which afterwards turned out to be worthless.

Decision of Hilbery J. ante p. 107 affirmed.

APPEAL from a decision of Hilbery J. (1)

The facts are fully set out in the report in the Court below and are summarized in the headnote. Hilbery J. held on the claim against H. A. Buck that on the facts H. A. Buck was not the owner of the van and had no power to prevent its user by W. E. Buck; that even if the brothers knew that the result of the use of H. A. Buck's name as owner and the other statements in the proposal form might invalidate the policy, the policy was only voidable and not void, and until the insurers avoided it, which they were not obliged to do, it was a valid and subsisting policy; and that therefore at the date of the accident W. E. Buck was not driving the van without there being in force a policy of insurance. A fortiori H. A. Buck did not cause or permit him to do so, and therefore the claim against H. A. Buck failed.

The plaintiff appealed. The appeal was heard on February 22, 23, 1940.

F. D. L. McIntyre for the appellant repeated the argument advanced in the Court below.

The respondent, H. A. Buck, in person was not called on to argue.

MACKINNON L.J. This is an appeal from a decision of Hilbery J. in a very hard case. It is one in which I should have been glad if we could have assented to the careful and very able argument of Mr. McIntyre.

The action was brought by the widow of an unfortunate man who was knocked down (and so injured that he died) by a Ford van, which was being driven by a man named William Edward Buck. The action was brought against William Edward Buck, and also against H. A. Buck, who was his brother. There was no question that the accident was due to the negligent driving of William Edward Buck; and the learned judge gave damages amounting to a sum of 2500*l.* against him. But William Edward Buck was a man of straw—utterly impecunious. What was still more disastrous was, that at the time he was recklessly driving this van, there was not in existence an effective policy of insurance covering him against third-party risks. He had procured a policy by putting forward a proposal to the Zurich General Accident Insurance Company: but in earlier proceedings the Zurich Company had brought an action against William Edward Buck and Henry Albert Buck, claiming that it had a right to avoid that policy. That action was tried by Branson J., and he came to the conclusion that the insurance company had made out that the whole business in connection with the proposal was utterly fraudulent; and he set aside that policy. The result was, that when this accident happened there was no effective policy of insurance in existence. The consequence was, that the unhappy plaintiff, who had sustained over 2000*l.* worth of damages, had the prospect of having no one to answer her claim against the impecunious William Edward Buck.

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(1) Ante, p. 107.

In those circumstances, not unnaturally, she looked round to see whether she could not find some one else with at any rate a little money to pay some of these damages. She sought to find that person in H. A. Buck, the brother of the driver of the van. Her claim against H. A. Buck is based upon the principle that was laid down in *Monk* v. *Warbey* (1), that where there has been a breach of the provisions of s. 35, sub-s. 1, of the Road Traffic Act, 1930, not only is the person committing a breach of that section liable to the penalty in the criminal courts provided by that section, but he is also liable in damages civilly to a third person who has been injured as a result of his negligence.

Sect. 35, sub-s. 1, of the Road Traffic Act, 1930, provides as follows: "Subject to the provisions of this Part of this "Act, it shall not be lawful for any person to use, or to cause

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"or permit any other person to use, a motor vehicle on a "road unless there is in force in relation to the user of the "vehicle by that person or that other person, as the case "may be, such a policy of insurance or such a security in "respect of third-party risks as complies with the requirements "of this Part of this Act." Then sub-s. 2 is: "If a person "acts in contravention of this section, he shall be liable to "a fine not exceeding fifty pounds . . . ."

The claim made in this case is that, though the van had been driven by W. E. Buck, H. A. Buck, his brother, was liable to a prosecution under s. 35, as having caused or permitted W. E. Buck to use this van on the road without there being in force any effective policy of insurance. It is said that H. A. Buck could have been successfully prosecuted and fined 50*l.* under that section; and, therefore, it follows, under the principle of *Monk* v. *Warbey* (1), that he is also liable to pay the damages sustained by the plaintiff through the negligent driving of the van by W. E. Buck when there was no effective policy in existence.

The whole question is whether H. A. Buck could have been successfully prosecuted under this section. The offence is "to cause or permit any other person to use." There are two different verbs. The second one, "permit," I think is much more easy of construction and interpretation than the first one, "cause." In order to make a person liable for permitting another person to use a motor vehicle, it is obvious that he must be in a position to forbid the other person to use the motor vehicle. As at present advised, I can see no ground on which any one can be in a position to forbid another person to use a motor vehicle except where he is the owner of the car. The owner of a car can forbid another person to use it, or can permit the other to use it. It was no doubt for that reason that considerable effort was made to establish that in this case H. A. Buck was really the owner of this car. It was in fact registered in the log-book of the London County Council in his name. But it appears on investigation that the truth of the matter is that

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W. E. Buck, being impecunious and having a judgment against him in respect of another car which he had had under a hire-purchase agreement, and the instalments for which he could not continue to pay, wanted to obtain the use of a car in his business of a greengrocer in such circumstances that it would not be liable to be taken in execution by his creditors. He, therefore, procured his brother, H. A. Buck, by a wholly discreditable manœuvre, to lend him a sum of 20*l.*, with which he, W. E. Buck, could buy this second-hand Ford van. The only connection as to the ownership of this van between H. A. Buck and the van was, that he had lent his brother 20*l.* in order that he, W. E. Buck, could buy this van. W. E. Buck did buy the van, and registered it in the name of H. A. Buck; but the truth was that it never was H. A. Buck's van, but it was at all times the property of W. E. Buck.

That being so, the attempt to make H. A. Buck liable under that limb of the section, which makes it an offence to permit any other person to use a motor vehicle on the road without there being in force a proper insurance policy, fails in limine; because it is not established that there was any right in H. A. Buck to forbid W. E. Buck to use the car. He could only have that right to forbid him using it if he was the owner of the car: and he was not.

There remains the question whether it could be charged against H. A. Buck that he caused W. E. Buck to use the motor vehicle on a road. What happened with regard to that was that H. A. Buck, also in a very discreditable way, assisted his brother in procuring the Zurich Insurance Company to issue this policy, which the Zurich Insurance Company afterwards succeeded in getting set aside in the proceedings before Branson J. With the knowledge of H. A. Buck, William Edward Buck put forward a proposal to the Zurich Insurance Company in which he inserted the name of H. A. Buck as the proposer and owner of the vehicle. There is no evidence that H. A. Buck ever saw this document; but he made a statement, which has been put in and acted upon, in which he agrees that he knew all about it, and assented

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to his brother's account of this transaction. It was, therefore, with the approval and permission of H. A. Buck that W. E. Buck forged the name of H. A. Buck as the proposed assured in the proposal form put forward to the insurance company. The proposal signed "H. A. Buck" was in fact signed by W. E. Buck: "Full name of proposer: Henry Albert Buck. Trade or business: "Fruiterer or greengrocer." In fact, H. A. Buck was a butcher; and it was W. E. Buck who was the greengrocer. "Business address: 56, Brewery Road, Plumstead." That, in fact, was not the business address of H. A. Buck; though he had a butcher's shop next door at 58. "Purpose "for which the vehicle was to be used: Own goods." That was untrue; because it was not to be used for H. A. Buck's butcher's business, but for W. E. Buck's greengrocery business. "(7.) Are you the actual owner of the vehicle: "Yes." Then the named driver who, as agent and servant of the proposer, H. A. Buck, is to drive the van, is put as William Edward Buck.

With regard to this matter, what H. A. Buck did was this. He assisted or permitted or stood by while to his knowledge his brother, W. E. Buck, was putting forward these grossly misleading and inaccurate statements to the insurance company, with the result that his brother did procure the insurance company to issue an insurance policy purporting to cover Henry Albert Buck, carrying on the business of fruiterer and greengrocer, in respect to this van, with an endorsement stating that it was agreed that it should always be driven by William Edward Buck, as the servant or driver of the defendant. That was the policy which, by reason of concealment and misrepresentation in the proposal, the insurance company was able to get set aside. That was the connection with this insurance which H. A. Buck had. He stood by, knowing that his brother was going to put forward this preposterous and fraudulent document to the insurance company.

In those circumstances, can it be said that H. A. Buck caused W. E. Buck to use the motor vehicle on the road without there being in force an effective insurance policy against third-party risks? I do not think it can. As I have said, I should have been glad to be able to decide this appeal in favour of this unfortunate plaintiff, who is apparently left with nothing but a claim against this impecunious man, W. E. Buck. But all that can be said is that H. A. Buck assisted his brother in obtaining a worthless piece of paper in place of an effective insurance policy. But if he did that, and it was proved that he did that, I do not see how he could have been prosecuted successfully upon an allegation that he had caused W. E. Buck to use the vehicle on the road without there being in force an effective policy.

In the result, I think that the decision of Hilbery J. was correct, and that this appeal fails.

CLAUSON L.J. I agree.

CHARLES J. I agree.

Appeal dismissed.

Solicitors for appellant: *Evill & Coleman.*

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Courts—Emergency powers—Leave to proceed to enforcement of judgment—Whether judgment for debt due by virtue of contract made after commencement of Act—Action brought before commencement of Act—Terms of settlement arranged after commencement of Act—Payment of debt by instalments—In case of default plaintiff to have liberty to sign judgment for balance of debt outstanding—Default in payment of instalments—Judgment signed for balance of debt outstanding—Courts (*Emergency Powers*) *Act*, 1939 (2 & 3 *Geo.* 6, *c*, 67), *s.* 1.

In April, 1939, the plaintiff issued a writ claiming the sum of 2225*l*. from the defendant. The Courts (Emergency Powers) Act, 1939, came into operation on September 2, 1939. On December 11, 1939, terms for the settlement of the action were arranged between counsel under which the defendant admitted that he was indebted to the plaintiff in the sum of 1324*l*. and 100*l*. for costs, and the plaintiff agreed to accept that sum by monthly instalments of 50*l*. It was also agreed that if default was made in the payment of any monthly instalments the plaintiff should be at liberty to sign judgment for the balance then outstanding. There was to be " judge's order if necessary ". The terms were approved by the judge, and a note of the terms was signed by counsel with the addition of the words " liberty " to apply ". The defendant made default in payment of the instalments, and on the application of the plaintiff judgment was entered for the balance then outstanding. The plaintiff then applied under the Courts (Emergency Powers) Act, 1939, for leave to proceed to execution or otherwise enforce the judgment. The Master held that the Act applied and gave the plaintiff leave on certain terms. The judge in Chambers held that the judgment was for the recovery of a debt which had become due by virtue of a contract made after the commencement of the Act of 1939, and that therefore the plaintiff by virtue of the proviso to s. 1, sub-s. 1, could proceed to enforce his judgment. On appeal:—

Held, reversing the decision of the judge in Chambers, that the judgment was not a judgment for a debt which had become due by reason of the contract of settlement, but a judgment for so much of the debt claimed in the action in respect of a liability earlier in date than the Courts (Emergency Powers) Act, 1939, as remained outstanding, and that therefore the Courts (Emergency Powers) Act, 1939, applied to the case, which did not fall within the proviso to s. 1, sub-s. 1.

APPEAL from a decision of Oliver J. sitting in Chambers.

In April, 1939, the plaintiff issued a writ against the defendant claiming the sum of 2225*l*. for money had and received by the defendant as solicitor for and on behalf of the plaintiff.

The case was in the list to be heard before Tucker J. on December 11, 1939, when counsel met and arranged terms of settlement. By para. 1 the defendant admitted that he was indebted to the plaintiff in the sum of 1324*l.*, and agreed to pay the plaintiff the sum of 100*l.* towards his costs. By para. 2 the plaintiff agreed to accept payment of that sum by payment of the costs and payment of 125*l.* of the agreed debt forthwith, and payment of the balance by monthly instalments of 50*l.* By para. 3 it was agreed that until the total moneys had been paid the plaintiff was to be entitled to hold certain equitable sub-mortgages as security. By para. 4 the plaintiff agreed that upon the total moneys mentioned in para. 1 being paid to him he would, at the expense of the defendant, transfer the securities. Para. 5 provided as follows: "In "the event of any of the instalments mentioned in paragraph 2 "hereof being unpaid within 3 days after the due date of "payment the plaintiff will be at liberty to sign judgment "for the whole of the balance then outstanding and on the "happening of that event the plaintiff shall hold the aforesaid "equitable sub-mortgages as collateral security until the "whole amount of the judgment obtained is satisfied. Judge's "order if necessary." The case was then mentioned to Tucker J. and the terms of settlement were approved by him, and a note of the terms was signed by counsel with the addition of the words, "Liberty to apply".

The defendant paid certain instalments but eventually made default. Whereupon the plaintiff went to the judge in Chambers, who happened to be Tucker J., and asked for such judge's order as was required to enable the plaintiff to sign judgment for the whole of the balance outstanding. Tucker J. on February 22, 1940, ordered that judgment be entered for the plaintiff for the balance then outstanding, namely, 1149*l.* 11*s.* 2*d.*, and the officer of the Court drew up the formal order in the action commenced by the writ adjudging that the plaintiff do recover from the defendant 1149*l.* 11*s.* 2*d.*

The plaintiff then applied to a Master under the Courts

(Emergency Powers) Act, 1939, for leave to proceed to execution or otherwise enforce the judgment. Master Simner held that the Courts (Emergency Powers) Act, 1939 (1), applied to the case and gave the plaintiff leave to proceed to execution on the judgment, but that such leave should be suspended so long as the defendant paid 10*l*. per month off the judgment.

The plaintiff appealed to Oliver J. sitting in Chambers, who took the view that the judgment was a judgment for the recovery of a debt which had become due by virtue of a contract made after the commencement of the Courts (Emergency Powers) Act, 1939 (1), and that therefore there was nothing to prevent the plaintiff from proceeding to enforce his judgment.

The defendant appealed.

R. Fortune for the appellant. The decision of the judge in Chambers was wrong. The defendant was entitled to the protection afforded by the Courts (Emergency Powers) Act, 1939, as the judgment which the plaintiff was seeking to enforce was for the balance outstanding in the action which was commenced in April, 1939. The plaintiff did not bring an action on the compromise but claimed to recover the balance due in the original action, and therefore proviso (*b*) of s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1939, has no application.

C. L. Henderson for the respondent. The judgment was for the recovery of a sum due under the terms of settlement which were agreed to on February 22, 1940, and therefore due by virtue of a contract made after the commencement of the Courts (Emergency Powers) Act, 1939, and therefore under proviso (*b*) of s. 1, sub-s. 1, of that Act, the Act does not apply to this judgment.

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(1) Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 1: "Subject "to the provisions of this section, "a person shall not be entitled, "except with the leave of the "appropriate court, to proceed to "execution on, or otherwise to the "enforcement of, any judgment "or order of any court (whether "given or made before or after the "commencement of this Act) for "the payment or recovery of a "sum of money:

"Provided that nothing in this "sub-section shall apply to— ". . . . (*b*) any judgment or order "for the recovery of a debt which "has become due by virtue of a "contract made after the commencement of this Act."

Sect. 6, sub-s. 2: "This Act "shall come into operation on such "date as His Majesty may by "Order in Council appoint."

The Act was dated September 1, 1939, and by the Defence Commencement of Enactments Order, 1939, the Act came into force on September 2, 1939.

CLAUSON L.J. In the month of April, 1939, the plaintiff issued a writ against the defendant claiming a sum of 2225*l.* for money had and received by the defendant as solicitor for and on behalf of the plaintiff. On February 22, 1940, Tucker J. ordered, and on the same day the order was complied with, that judgment be entered for the plaintiff for 1149*l.* 11*s.* 2*d.* and certain costs. The order was drawn up in the proper form, "It is this day adjudged that the "plaintiff recover from the defendant" that sum. On that statement with nothing more it would appear to be plain that the judgment so adjudged on February 22, 1940, was not a judgment for the recovery of a debt which became due by virtue of a contract made after the commencement of the Courts (Emergency Powers) Act, 1939, which commenced on September 2, 1939, and accordingly if that was all that was in the case the result would have been that the plaintiff could not proceed to execution of or otherwise enforce that judgment without the leave of the appropriate Court. The plaintiff applied for leave and the Master, taking the view that the Courts (Emergency Powers) Act, 1939, applied to the case (as on the very jejune statement I have made up to this moment seems to me to be quite plain) made an order giving leave to proceed on certain terms. The plaintiff, not being satisfied with those terms, appealed to the learned judge who took the view, for reasons which will appear when I state the facts at greater length, that this judgment was a judgment for the recovery of a debt which had become due by virtue of a contract made after the commencement of this Act, and accordingly held that there was nothing to prevent the plaintiff proceeding to the enforcement of his judgment. Although in the view taken by the learned judge the matter was, by virtue of

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the proviso to s. 1, sub-s. 1, wholly outside the purview of the Courts (Emergency Powers) Act, the order was drawn up in the form of giving leave to proceed to enforcement under s. 1 of the Act. That is per incuriam. The point of it is that the learned judge held that there was nothing to prevent the plaintiff proceeding to enforce his judgment. There is now an appeal by the defendant to us and he asks us to say that the learned judge was wrong in holding that the case came within the proviso to s. 1, sub-s. 1, of that Act, and that accordingly either the order of the Master, which gave only conditional leave to proceed to enforcement should be restored, or some opportunity should be given, if necessary, for the terms of that order to be reconsidered: anyhow, the point made by the appellant is that the learned judge was wrong in holding that the judgment in question came within the proviso.

I must now proceed to state somewhat more fully what has occurred. The writ, as I have stated, was issued claiming 2225*l.* There were pleadings in the usual way, but I do not think it is necessary to go into the details of the claim. When the matter was about to come on for trial before Tucker J. on December 11, 1939, counsel having met, terms of settlement were come to in a form which is very familiar according to the practice of the King's Bench Division. The real importance of the matter is that we are asked to construe these terms, which involves construing and giving a decision upon the effect of a scheme for settling an action which is adopted daily in the King's Bench Division; and for that reason it is most desirable that the matter should be dealt with on principle and correctly. [His lordship then stated the terms of the settlement as set out above.] It is perhaps superfluous to point out that the admission in the first paragraph is that the defendant is indebted in the sum of 1324*l.* in respect of the liability which in the writ the plaintiff claims to be a liability for the larger sum of 2225*l.* The terms were settled between counsel and reduced into writing; the terms were then mentioned to Tucker J., who approved them with the addition of the words, "Liberty to apply". Certain instalments were paid which would, of course, go in diminution of the 1324*l*. Then an instalment which had become due was not paid within due time, and the plaintiff applied to the judge in Chambers, who happened in fact to be Tucker J., and asked for such judge's order as was required in order to enable him to obtain judgment for the whole of the balance outstanding. The learned judge ordered that judgment be entered for the plaintiff for the sum which on the evidence produced before him was, as he was satisfied, the balance then outstanding, in fact, 1149*l*. 11*s*. 2*d*.; and accordingly the officer of the Court under that order drew up the formal order adjudging that the plaintiff do recover from the defendant 1149*l*. 11*s*. 2*d*.

It is true in a sense to say that it was by virtue of the terms of the settlement and the contract there made between the plaintiff and the defendant through their counsel that the figure to be recovered in the action was quantified at a figure which, having regard to the subsequent payments, became the 1149*l*. recorded upon the judgment. The figure for which judgment was given was, no doubt, reached by virtue of the terms of settlement. But what does that figure mean? It means this, that the Court adjudged that in respect of the claim made in the writ the sum to be recovered, having regard to everything that had supervened in the course of the action, was to be, not the sum claimed in the writ, the 2225*l*., but 1149*l*. 11*s*. 2*d*. Accordingly, in my opinion, that judgment is a judgment not for the recovery of a debt which has become due by reason of the contract of settlement; it is a judgment for the recovery of so much of the debt claimed by the statement of claim in respect of a liability earlier in date than the Courts (Emergency Powers) Act, 1939, as then remained outstanding. The case does not, in my view, fall within the proviso at all. The Courts (Emergency Powers) Act, 1939, applies to it and some such order as the Master made—whether or not the terms are proper terms may be a matter for discussion—was properly made. It will be observed that in coming to that conclusion I have come to it upon this ground, that I construe these

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terms of settlement, where the phrase "Judge's order if "necessary" is used, to mean not that, if necessary, the parties may apply in the action for some order to enforce the terms; it does not mean that at all as I read it; it means that one of the terms is that a judgment shall be taken, if necessary, for part of the sum claimed in the action; if that necessity arises the parties will concur in or will not oppose the necessary order being made by the judge. That, as it seems to me, is the effect of the terms, and when the learned judge added, "Liberty to apply," that was that the Court sanctioned what in fact occurred, namely, that the action was not finally determined upon the day on which it came in the judge's paper, on December 11, 1939, but remained undetermined in order that, if necessary, at some moment it should be completely determined by the judgment being given which would then be found to be the right judgment to give having regard to the arrangement that the parties had entered into. When one turns to the judgment one finds that it is quite properly framed in this way: "This action "having on the 11th December, 1939, and 22nd February, "1940, been tried before the Honourable Mr. Justice Tucker "without a Jury, in the County of Middlesex, and the said "Mr. Justice Tucker, on the 22nd February, 1940, having "ordered that Judgment be entered for the Plaintiff for "1149*l.* 11*s.* 2*d.* with costs of this day's application: it is this "day adjudged that the Plaintiff recover from the Defendant "1149*l.* 11*s.* 2*d.* and costs of the application of 22nd February, "1940, to be taxed." The truth is that this method of procedure for the settlement of an action is technically this: the judge is asked not to try the action for the present but to leave it in such a position that such a judgment as is proper, having regard to the arrangement between the parties, should be given at some future date if it becomes necessary, and that the trial should then be completed. A little confusion is sometimes imported into a case of this kind by the fact that there is quite a different method of settling an action which is not uncommon in the Chancery Division although it would be very difficult, I imagine, to adapt it to the normal procedure of the King's Bench Division. In the Chancery Division it is not uncommon to say to the learned judge when the action is coming on: "We have settled "this action; will you please stay all proceedings and put "an end to the action, but with this limitation, that it is the "desire of all parties that if a question arises on the "construction, or the working out or the enforcement, of the "terms of settlement, it should be dealt with as though the "action were for that purpose still alive?" The object thus to be attained is effected by an order staying proceedings on the terms of the settlement—and they are usually scheduled to the order—with liberty to apply to the judge. It is not liberty to apply to the judge to give judgment in the action, but liberty to apply to the judge to make such order as, having regard to the terms of the settlement, the parties consensually agree should be made in order to enforce their intentions.

For these reasons, in my judgment, the learned judge came to a wrong conclusion; but it is to be borne in mind that there may still be a question which has not been dealt with by the learned judge—it was not necessary for him to deal with it in the view he took of the legal position—whether the terms which the Master has imposed are the right terms or whether they ought to be modified. Accordingly the order which this Court will make will be this: The appeal will be allowed with costs. Discharge the order of the learned judge, including his order as to costs, and refer the appeal to the learned judge in Chambers to proceed with the hearing of the appeal from the Master having regard to the decision of this Court. That will leave it to the learned judge to say, as I understand the plaintiff wishes to ask the learned judge to say, that the terms which the Master imposed are not the terms that ought to be imposed. On that he will have to deal, of course, with the costs of the previous hearing (because this will be a continuance of that appeal), the costs of the appeal to the judge and the costs before the Master.

LUXMOORE L.J. I agree entirely with the judgment which has just been delivered by my brother Clauson and do not desire to add anything to it.

Appeal allowed.

Solicitors for appellant: *J. Howard Smith & Skelt.*
Solicitors for respondent: *Harris, Chetham & Cohen.*

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Alien—Resident in Mandated Territory—Palestine—Palestine Mandate—Treaty of Lausanne—British Nationality and Status of Aliens Act, 1914 (4 & 5 *Geo.* 5, *c.* 17), *s.* 27, *sub-s.* 1—*British Nationality and Status of Aliens Act,* 1918 (8 & 9 *Geo.* 5, *c.* 38), *s.* 2, *sub-s.* 6—*Palestinian Citizenship Order,* 1925 (*St. R. & O.,* 1925, *No.* 777), *para.* 1.

The appellant was born in Palestine in 1911 and until 1923 he was admittedly a Turkish subject. He lived in Palestine until 1937 when he came to England with a passport entitled "British Passport. Palestine" and issued by the British High Commissioner in Palestine. The appellant having been convicted of offences under the Aliens Order, 1920:—

Held, that the appellant was an alien and had been rightly convicted, he not having become a British subject either by virtue of art. 30 of the Treaty of Peace with Turkey signed at Lausanne on July 24, 1923 (which provided that Turkish subjects habitually resident in territory which, in accordance with the provisions of that Treaty, was detached from Turkey should become ipso facto, in the conditions laid down by the local law, nationals of the State to which such territory was transferred), or by virtue of the Palestine Mandate which was given by the League of Nations to Great Britain on July 24, 1922, since Palestine was not transferred to, and, consequently was not annexed, within s. 27, sub-s. 1, of the British Nationality and Status of Aliens Act, 1914, as amended by s. 2, sub-s. 6, of the British Nationality and Status of Aliens Act, 1918, by Great Britain by either the Treaty or the Mandate.

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Held, further, that the effect of the Palestinian Citizenship Order, 1925, was prima facie that the appellant, being a Turkish subject habitually resident in Palestine on August 1, 1925, then became a Palestinian citizen. Even if the Order, at least so far as the first paragraph was concerned, was of no force or validity because it had been made by the mandatory power and not by the administration of Palestine, who were responsible under art. 7 of the Mandate, the appellant would remain a Turkish subject and not become a British subject.

APPEAL against conviction.

The appellant was convicted at the Central Criminal Court on December 13, 1938, on an indictment containing two counts under the Aliens Order, 1920: (1.) That on November 12, 1938, he being an alien effected a change of residence and failed to report his arrival at his new place of residence to the registration officer within forty-eight hours; and (2.) That on November 25, 1938, he being an alien subject to an order made by the Home Secretary varying the conditions of the leave given to him to land and requiring him to leave the United Kingdom by September 30, 1938, failed to comply with such order. He was sentenced to eleven days' imprisonment and recommended for deportation.

The appellant was born in Jerusalem of Jewish parents on November 16, 1911, and until 1923 he was admittedly a Turkish subject. He resided in Palestine until 1937 when he came to England with a passport which was entitled "British "Passport. Palestine" and had been issued by the British High Commissioner in Palestine. On reaching England he obtained permission to land and to remain for a limited time, which was subsequently extended. By an order made by the Home Secretary on September 14, 1938, he was required to leave England by September 30, 1938, but he failed to comply with that order.

He appealed on the ground that he was not an alien, but a British subject.

H. Lester for the appellant.
J. H. Buzzard for the Crown.

SINGLETON J. delivered the judgment of the Court (HUMPHREYS, SINGLETON and LEWIS JJ.) in which he stated the facts and continued: The only question before this Court is whether the appellant is an alien within the British Nationality and Status of Aliens Act, 1914. If he is an alien it is not disputed that he committed the offences alleged. By s. 27, sub-s. 1, of the Act "alien" means a person who is not a British subject, and by the same sub-section, as amended by s. 2, sub-s. 6, of the British Nationality and Status of Aliens Act, 1918, "British subject" means "a "person who is a natural-born British subject, or a person "to whom a certificate of naturalization has been granted, "or a person who has become a subject of His Majesty by "reason of any annexation of territory."

It is common ground that in such proceedings as the present

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the onus of proving that he is not an alien lies on the person charged. At the trial at the Central Criminal Court Mr. Lester based his case almost wholly on the passport issued to the appellant which he claimed was a British passport, but it is difficult to see that this could lead the appellant to think that he was a British subject or could make him one. On appeal Mr. Lester relied on wider grounds. He referred to the Treaty of Peace with Turkey, which was signed at Lausanne on July 24, 1923, and in particular to art. 30 of that Treaty which deals with nationality and provides: "Turkish "subjects habitually resident in territory which in accordance "with the provisions of the present Treaty is detached from "Turkey will become ipso facto, in the conditions laid down "by the local law, nationals of the State to which such territory "is transferred." He submitted that under that article Palestine was transferred to Great Britain and every Turkish subject resident in Palestine became ipso facto a subject of Great Britain. It was agreed that the appellant had been a Turkish subject. Certain other parts of Turkey were transferred to other States by that Treaty and it appears to us that art. 30 dealt only with those territories.

Mr. Lester also relied on the mandate for Palestine which was given to Great Britain on July 24, 1922. The mandate itself begins by recitals: "Whereas the Principal Allied "Powers have agreed, for the purpose of giving effect to the "provisions of Article 22 of the Covenant of the League of "Nations, to entrust to a Mandatory selected by the said "Powers the administration of the territory of Palestine, which "formerly belonged to the Turkish Empire . . . . and . . . . . "Whereas the Principal Allied Powers have selected his "Britannic Majesty as the Mandatory for Palestine; and . . . . "Whereas by the aforementioned article 22 . . . . it is "provided that the degree of authority, control or administration to be exercised by the Mandatory, not having been "previously agreed upon by the members of the League, shall "be explicitly defined by the Council of the League of Nations; "[the Council] confirming the said Mandate, defines its terms "as follows: Article 1. The Mandatory shall have full

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"powers of legislation and of administration, save as they may "be limited by the terms of this mandate." Then by art. 7: "The Administration of Palestine shall be responsible for "enacting a nationality law. There shall be included in this "law provisions framed so as to facilitate the acquisition of "Palestinian citizenship by Jews who take up their permanent "residence in Palestine." By art. 12: "The Mandatory "shall be entrusted with the control of the foreign relations "of Palestine and the right to issue exequaturs to consuls "appointed by foreign Powers. He shall also be entitled to "afford diplomatic and consular protection to citizens of "Palestine when outside its territorial limits." There are other articles which are of less importance, except perhaps art. 5, which provides: "The Mandatory shall be responsible "for seeing that no Palestine territory shall be ceded or leased "to, or in any way placed under the control of, the Government "of any foreign Power." The true effect of this is that his Britannic Majesty accepted the mandate in respect of Palestine and undertook to exercise it on behalf of the League of Nations in conformity with the provisions contained in it. There was no provision in art. 30 for the transfer of territory to Great Britain. If there had been, there would have been no need for the mandate.

The Palestine Order in Council of 1922 followed, in which the territories to which the mandate applied are dealt with. Part II. of that order relates to the Executive, Part III. to the Legislature, and Part V. to the Judiciary, and Part VIII. is general. Part VIII. contains three paragraphs of importance. Para. 87 provides: "The High Commissioner may by "proclamation in the Gazette at any time within one year "from the date of the commencement of this Order . . . . "vary, annul or add to any of the provisions of this Order "in order to carry out the purposes of the same, and may "provide for any other matters necessary in order to carry "into effect the provisions thereof." Para. 88 provides: "His Majesty, his heirs and successors in Council, may at "any time revoke, alter or amend this Order." And by para. 89: "There shall be reserved to His Majesty, his heirs "and successors, the right, with the advice of his or their "Privy Council, from time to time to make all such laws or "ordinances as may appear to him or them necessary for "the peace, order and good government of Palestine in "accordance with the Mandate conferred on him."

In 1925 there came into being the Palestinian Citizenship Order, 1925. That order was made in exercise of the powers under the Foreign Jurisdiction Act, 1890. That Act defines "foreign country" in s. 16 as meaning "any country or place "out of her Majesty's dominions." The order contains two recitals: "Whereas by treaty, capitulation, grant, usage, "sufferance and other lawful means his Majesty has power "and jurisdiction within Palestine: And whereas it is desirable "to regulate the grant and acquisition of Palestinian citizen"ship." Para. 1, sub-para. 1, provides: "Turkish subjects "habitually resident in the territory of Palestine upon the 1st "day of August, 1925, shall become Palestinian citizens."

The appellant was a Turkish subject habitually resident in the territory of Palestine on August 1, 1925. Prima facie, therefore, the order makes it clear that the appellant became a Palestine citizen. But Mr. Lester has argued that that order—the Palestinian Citizenship Order, 1925—at least as regards the first paragraph, is of no force or validity as having been made by the mandatory power and not by the administration in Palestine who were the responsible authority under art. 7 of the mandate, and he says that there is a distinction made in the mandate between the mandatory power and the administration. Even if we accepted that argument —and we are far from saying that we do accept it—in our opinion the result would be that the appellant remained a Turkish subject and not that he became a British subject.

Mr. Lester said that Great Britain had no power to make the appellant a subject of any country except its own country. The answer to that is that nothing has been done in law to make him a subject of Great Britain. He is not within the provisions of the British Nationality and Status of Aliens Act, 1914, because there has been no annexation of Palestine. It follows that he is not a British subject, but an alien.

Our attention was called to a case decided in the High Court of Palestine, *Attorney-General* v. *Goralschwili.* (1) The facts in that case were that application was made by the Italian Government to the Government of Palestine for the extradition to Italy of two persons resident in Jerusalem. By the Anglo-Italian Extradition Treaty, 1873, which was applied to Palestine, British subjects were not to be surrendered to Italy nor Italian subjects to Great Britain. The accused persons had obtained provisional certificates of special citizenship, which were issued by the Government before the enactment of the Palestinian Citizenship Order. It was contended that they should be treated as British subjects on the ground that the subjects of a mandated territory obtained the nationality of the mandatory State. Nevertheless, an order of extradition was made and, on application to the High Court for a writ of habeas corpus, the Court held that the subjects of the mandated territory of Palestine had not become British subjects and might be surrendered to Italy. It is satisfactory to know that our view accords with that of the High Court of Palestine.

The appeal fails and must be dismissed.

Appeal dismissed.

Solicitor for appellant: *Registrar of the Court of Criminal Appeal.*

Solicitor for Crown: *City Solicitor.*

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(1) McNair and Lauterpacht's Annual Digest of Public International Law Cases for 1925–26, p. 47.

G. F. L. B.

WEST CHESHIRE WATER BOARD *v.* CROWE.

1940
April 4.

Local Government—Finance—Power to borrow for payment of interest out of capital—Interest paid out of revenue—Subsequent loan to recoup interest—Disallowance—West Cheshire Water Board Act, 1925 (15 *&* 16 *Geo.* 5, *c. cxiii.*), *s.* 83—*West Cheshire Water Board Act,* 1927 (17 *&* 18 *Geo.* 5, *c. cxxiii.*), *s.* 46, *sub-s.* 1 (*d*).

A water board was empowered by statute to borrow money for the construction of works and also to borrow for the purpose of paying interest on those borrowed moneys out of capital. It also had power to pay interest on loans out of revenue. For nine years the Board paid interest out of revenue on loans from time to time outstanding. It then, in purported exercise of the power to borrow for payment of interest out of capital, borrowed a sum amounting to rather more than the total amount of interest so paid and credited the amount raised to a reserve fund. The auditor having disallowed the amount of this loan so far as it represented interest paid out of revenue in previous years :—

Held, that he was right in so doing since the power given was a power to borrow to pay interest as it fell due and it was never contemplated that it should be exercised to recoup interest paid out of revenue in previous years.

APPEAL under s. 229 of the Local Government Act, 1933, from a disallowance by a district auditor.

The West Cheshire Water Board is a statutory body corporate established by the West Cheshire Water Board Act, 1925 (" the Act of 1925 "), to manage and carry on a water undertaking and to supply water within the limits therein defined. The Board consists of representatives of three local authorities whose ratepayers are liable to contribute to any deficit and to benefit by any surplus in the Board's revenue. The accounts of the Board are to be made up to March 31 in each year and audited by the district auditor. The Act of 1925 contains financial provisions for the Board's undertaking, including, under ss. 63 and 64, powers to borrow money at interest by mortgage or otherwise. Sect. 83 contains provisions as to the application of the revenue of the Board. (1) The West Cheshire Water Board Act, 1927 (" the Act of 1927 "), authorizes the acquisition by the

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(1) See note (1), post, p. 794.

Board of further lands, and the construction of further works, and s. 46, sub-s. 1, gives additional borrowing powers. (1)

The Board duly constructed the authorized works after the passing of the Act of 1927, and by March 31, 1937, had borrowed for the purposes of s. 46, sub-s. 1 (*c*), a total of 218,354*l.* That sum had been borrowed piecemeal as required, on fifty-six mortgages of various dates and at varying rates of interest. In each of the nine years down to March 31, 1937, the Board had revenue sufficient for the payment of the interest, and it did in fact pay the interest each year out of revenue under s. 83 of the Act of 1925, amounting in all to 47,644*l.* 12*s.* 11*d.* Between April 1, 1937, and October 12, 1937, further interest was paid, bringing the total up to 51,022*l.* 15*s.* 3*d.* On October 12, 1937, the works under s. 46, sub-s. 1 (*c*), of the Act of 1927 were completed. Down to October, 1937, no sums had been borrowed under s. 46, sub-s. 1 (*d*), for the payment of interest out of capital, but, on December 1, 1937, in pursuance of a resolution of the

(1) By the West Cheshire Water Board Act, 1925 (15 & 16 Geo. 5, c. cxiii.), s. 83: "The Board shall "apply all money received by "them on account of the revenue "of the undertaking in manner "and in the order following (that "is to say) :—

"First In payment of the "working and establishment ex-"penses and cost of maintenance "of the undertaking (including "the payment of any moneys "payable by the Board in respect "of any water supplied to them) ;

"Secondly In payment of the "interest on moneys borrowed by "the Board for the purposes of "the undertaking ; . . . .

"Sixthly In providing a "reserve fund (if the Board think "fit) . . . . which fund shall be "applicable . . . . for payment "of the cost of renewing improving "or extending any part of the "works.

"Lastly The surplus (if any) "including the interest on the "reserve fund when such fund "amounts to the prescribed maxi-"mum shall after retention by the "Board of such sum as is required "for carrying on the undertaking "be apportioned among and paid "to the constituent authorities in "proportion to the respective "assessable values of their respec-"tive constituent areas . . . ."

By the West Cheshire Water Board Act, 1927 (17 & 18 Geo. 5, c. cxxiii.), s. 46, sub-s. 1: "The "Board may from time to time "borrow at interest (in addition "to any moneys which they are "now authorised to borrow) for "the purposes mentioned in the "first column of the following "table the sums mentioned in the "second column thereof and they "shall pay off all moneys so "borrowed within the respective "periods mentioned in the third "column of the said table "(namely)—

Board dated October 5, 1937, 51,000*l.* was borrowed on mortgage from the Liverpool Victoria Friendly Society, and was allocated to the purposes of s. 46, sub-s. 1 (*d*). In the Board's books this sum was debited to a " capitalized interest account," and credited to the reserve fund account (where it became available, under s. 83 of the Act of 1925, for "payment of the cost of extending any part of the works," a purpose for which the Board had no power to borrow except with the consent of the Minister of Health under s. 46, sub-s. 2 (*a*), of the Act of 1927). It was stated in the affidavit of the clerk and manager of the Board that the purpose of this borrowing was to refund the sums from time to time paid out by way of interest on the money borrowed for the construction of works authorized by Part III. of the Act of 1927.

The district auditor, Mr. J. Wyndham Crowe, disallowed 47,622*l.*, being so much of the 51,000*l.* as represented loan interest charged to the Board's revenue account in the

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" 1.	2.	3.
Purpose.	Amount.	Period.
"(*c*) For and in connection with the "purchase of lands for and the "construction of the works "authorised by Part III. (Waterworks) of this Act.	£249,968	Forty-five years from the date or dates of borrowing.
"(*d*) For the payment out of capital "of interest on money borrowed "for the purposes (*c*) mentioned "in this sub-section until the "completion of works Nos. 1, 2 "and 3 by this Act authorised "or the expiration of eight years "from the date or dates of borrowing whichever be the earlier.	The sum requisite.	Forty-five years from the date or dates of borrowing.
"(*e*) For paying any sums payable "by the Board under the final "section of this Act.	The sum requisite.	Five years from the passing of this Act."

Sub-s. 2 (*a*): "The Board may "also with the consent of the "Minister of Health borrow such "further money as may be necessary for any of the purposes of "this Act."

financial years earlier than that beginning on April 1, 1937, on the ground that (*a*) to the extent of the sums disallowed the accounts relating to past years which had been closed and audited were reopened, and the acts and resolutions of the Board in each of those years for payment of the interest out of revenue were reversed retrospectively. (He based his disallowance under this head on *Reg.* v. *Chiddingstone Inhabitants* (1), and *In re Magrath* (2)) ; (*b*) in so far as the interest had been met out of revenue as it fell due, the purposes of the borrowing power under s. 46, sub-s. 1 (*d*), of the Act of 1927 had ceased to be capable of fulfilment and the power had lapsed ; and (*c*) to the extent of the sum disallowed, the sum credited to the reserve fund arose directly from the purported exercise of a borrowing power and it was not competent to the Board under s. 46, sub-s. 1 (*d*), or at all, to borrow to provide or contribute to a reserve fund to be applied (as the auditor found) in meeting the cost of construction of new works for which the Board had no power to borrow without the consent of the Minister of Health under s. 46, sub-s. 2.

From this disallowance the Board appealed.

S. G. Turner K.C. and *Charles Simes* for the appellant Board. Under the Acts of 1925 and 1927 there are three ways in which interest on borrowed money can be found : (1.) under s. 83 of the Act of 1925 the second purpose to which revenue may be applied is the payment of interest ; (2.) " Sixthly " in the same section, it may be paid out of the reserve fund ; (3.) it may be paid out of capital borrowed under s. 46, sub-s. 1 (*d*), of the Act of 1927. As a matter of construction, the first and third ways are not mutually exclusive, as the auditor has impliedly held them to be. The Acts contemplate precisely the procedure adopted, namely, the finding of the interest temporarily out of revenue followed by recoupment by the exercise of the borrowing power. The lender cannot be kept waiting for his interest. It must be paid on the due date out of revenue, and then, when the amount is definitely

(1) (1862) 2 B. & S. 294.

(2) [1934] 2 K. B. 415.

ascertained it can be borrowed. There is no time limit on the exercise of the power in s. 46, sub-s. 1 (*d*), though the interest must obviously be payable to the lender year by year. But in other cases a time limit is specifically imposed, e.g., in para. (*e*), where the power lapses and the loans must be repaid within five years from the passing of the Act. The financial structure of the Acts is such that the position is exactly the same as if the Board had borrowed year by year instead of paying the interest out of revenue, because it would thereby have saved this amount of revenue which it could have placed year by year to reserve. If the money is properly in the reserve, the renewing, etc., of any part of the works is one of the purposes to which it can properly be applied. If the borrowing power under s. 46, sub-s. 1 (*d*), has gone, it means either that the Board has waived it by paying interest out of revenue—but a statutory power cannot be waived—or that it has lapsed.

The cases relied on by the district auditor are distinguishable. There is here no question, as there was in *Reg.* v. *Chiddingstone Inhabitants* (1) of the propriety of earlier payments or of transferring any burden to the ratepayers. *In re Magrath* (2) was a case of a gratuity to an officer of a local authority in respect of work done by him in previous years for his ordinary salary. It was not a case of alternative methods of raising money for a lawful purpose. They also cited *Kruse* v. *Johnson.* (3)

R. M. Montgomery K.C. and *H. G. Robertson* for the respondent auditor. The intention of the statute was to give the Board power to borrow when it had not sufficient revenue to meet its interest payments. The Board has a certain revenue, out of which, under s. 83 of the Act of 1925 it has to pay first its expenses and then interest. When it has paid those items and certain others (some of which, but not the payment of interest, are optional), it may build up a reserve fund. But if there is finally a surplus it must be paid over to the constituent authorities; if there is a deficit, the constituent authorities must make it good. But, in any event, one is dealing with a year to year account. The appellants are wrong in suggesting that nobody is prejudiced by the course they had followed. If affects the ratepayers closely. If interest is paid out of revenue, there is a considerable reduction in the surplus revenue and there is little or nothing to pay over to the constituent authorities. The Board has for nine years reduced its surplus revenue by a large figure. If it had borrowed year by year there would have been a very much increased surplus, which it would then have had either to take to the reserve fund, if the maximum was not reached, or to pay over to the constituent authorities. But if with revenue in hand the Board had borrowed there might well have been complaints both from the ratepayers and the constituent authorities. The Board is not entitled to build up its reserve fund out of borrowed money, but only out of revenue. The purpose of this borrowing was not to pay interest—the Board could not produce to the auditor any vouchers or receipts for interest paid out of the loan—but it is a device—the term is not used offensively—to get 50,000*l.* for some other purpose, for which the Board is not entitled to borrow without the consent of the Minister of Health. The argument is not that the power to borrow has lapsed, but that the purpose for which money can be borrowed has, so far as these payments are concerned, disappeared. The money has been paid out of revenue and there is no debt for interest remaining to which the loan can be applied.

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(1) 2 B. & S. 294.

(2) [1934] 2 K. B. 415.

(3) [1898] 2 Q. B. 91.

S. G. Turner K.C. in reply.

HAWKE J. We are of opinion that the auditor was right in his decision. In my view, the words of s. 46, sub-s. 1 (*d*), of the Act of 1927 give power to borrow money to enable the Board to pay interest from time to time as the Board has to pay interest on money borrowed. I do not think that the words are susceptible of referring to payments of interest made out of revenue years previously and finished with. I do not believe that the statute ever contemplated anything of that sort. Mr. Turner's argument really amounted to this: "This being a statutory body, its powers are "determined by the express words of its statutes, and those "statutes did not give this authority the power which it "claims, but what it did was something very near that which "was permitted by the statutes." It is quite possible that what the Board has done is in fact very near what it might have done, but there is no cy près doctrine applicable to cases of this sort and the Board must keep strictly within its powers. When it borrowed money that borrowing was not to pay interest. It could get no receipt from anybody for a payment of interest. There was nobody to whom any interest was owing and such borrowing does not come within the terms of the statute.

I want to make one further observation. Mr. Montgomery has, to my mind, shown us quite convincingly that this is a matter which may have made a good deal of difference to the ratepayers of the three constituted authorities. If all it has done is to deprive those ratepayers of the chance of getting some relief—and I should think probably it is a great deal more than a mere chance—they have been deprived of that, and that makes a difference to them. On the plain reading of s. 46, sub-s. 1 (*d*), this money has been borrowed for a purpose which does not come within the words of that sub-section and the auditor was right in the decision to which he came. The motion, therefore, must be dismissed.

CHARLES J. It is agreed that the West Cheshire Water Board can only act strictly within the limits of its statutes. Under those statutes it has two alternatives. It can pay interest out of revenue on the money which it has raised. If it does that, it pays the lender his interest, as indeed it is bound to do, year by year, and presumably receives receipts year by year for the interest so paid. For nine years that is what it did. It thought that that was the most proper and appropriate way of satisfying the interest. But then it wanted money to extend its works. It could go to the

Minister for further borrowing if it liked, but it did not do so. It took the view that a convenient method would be to borrow, or affect to borrow, under s. 46, sub-s. 1 (*d*), of the Act of 1927, which authorizes it to borrow for the payment out of capital of interest on money borrowed, the sum already paid out of revenue by way of interest. That amounted to 51,000*l.* and that is the money the Board wanted to get into its hands. Was it for the purpose of paying interest? Let us consider the auditor's position. When he comes to that sum and asks for vouchers for interest paid with this borrowed money, he is told that nine years before some one was paid interest out of revenue account. The auditor must say: "What has that got to do with it? You have been satisfying "the interest out of revenue. I cannot go into back history." The payment of the interest was a completed transaction which, apparently, was carried out every year with perfect regularity and propriety in accordance with s. 83 of the Act of 1925. Then, in the ninth year, it is sought to borrow under the Act of 1927 the whole of that sum which has been so paid out of revenue under the designation of money "borrowed for the "payment out of capital of interest on money borrowed for "the purposes (*c*)," which is the construction of works. I cannot bring myself to believe that s. 46, sub-s. 1 (*d*), means anything of the sort, or that it can possibly be applied to this set of circumstances. I was very attracted by Mr. Turner's argument in which he contended that what was done was really only one manner of collecting money taking the place of another, that the position of no one was prejudiced, and that it was all perfectly right. But if one looks at the last part of s. 83 of the Act of 1925 one finds that some persons may have been greatly affected by the course which was adopted. The constituent areas (that is, in effect, the ratepayers) were vitally concerned in the method which was adopted. The method originally adopted was a perfectly proper method and it should have been left where it was. The attempt to replace it by what I venture to think, without offence, is an improper method, ought not to be allowed by this Court. The auditor stopped it, and the appeal is from his decision. We come to the conclusion that his decision was a perfectly correct one.

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WEST CHESHIRE WATER BOARD v. CROWE.

HILBERY J. I agree.

Appeal dismissed.

Solicitors for the appellant Board: *Lees & Co., agents for E. Cecil Francis, Ellesmere Port.*

Solicitors for the respondent auditor: *Sharpe, Pritchard & Co.*

J. W. H.

1940
April 24, 26.

MACDONALD *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Income tax—Avoidance by transactions resulting in transfer of income to persons abroad—Transfer effected mainly for purpose other than avoiding liability to taxation—Meaning of " taxation "—Finance Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 18, *sub-s.* 1.

In 1932 the appellant, who was ordinarily resident in the United Kingdom, transferred securities to an American corporation in consideration of the whole of the capital therein, the object of the transfer being to enable her to avoid income tax and sur-tax in the United Kingdom. In 1935 she executed a settlement in the United States by which she transferred all her shares in the corporation to an American trust company on trust (inter alia) to pay the income arising from the shares to her for life. The object of this transfer was the avoidance of British death duties. It being sought to assess the appellant to sur-tax in respect of dividend of the corporation paid the trust company and, at the direction of the appellant, paid by the trust company to a realty corporation in which the appellant held all the issued shares :—

Held, that the appellant was liable to the tax since both the 1932 transfer and that of 1935, which was an associated operation within s. 18, sub-s. 1, of the Finance Act, 1936, fell within that subsection so that the income of the trust company must be deemed to be her income. The 1932 transfer was clearly within the subsection, and, although the 1935 transfer itself was exempted from the provisions of the sub-section because it had, within the meaning of the proviso to the sub-section, been effected for some purpose other than that of avoiding liability to taxation, " taxation " in the proviso meaning income tax and sur-tax and not extending to include death duties, it was brought back within the sub-section because the 1932 transfer with which it was associated had been effected to avoid income tax and sur-tax.

Cottingham (Executors) v. *Inland Revenue Commissioners* [1939] 1 K. B. 250 followed.

CASE stated by the Special Commissioners of Income Tax.

At a meeting of the Commissioners held on October 26, 1938, the appellant, Mrs. Helen Babbott MacDonald, appealed against an assessment to sur-tax in the sum of 54,015*l.* for the year ended April 5, 1936. This assessment, which was an estimate, made under para. 7 of the Second Schedule of the Finance Act, 1936, was made on the basis that a sum estimated at 50,000*l.* fell to be included by virtue of the provisions of

s. 18 of the Finance Act, 1936 (1), as income for the year ended April 5, 1936.

The appellant, who was formerly a Miss H. L. Babbott, was born in the United States of American parents, and had been originally and still was an American citizen. In 1924 she married Mr. Swift Ian MacDonald, a Scotsman, and had ever since been ordinarily resident in the United Kingdom. Notwithstanding her marriage and change of residence the appellant had continued to retain her American citizenship.

In 1932 the appellant transferred certain American stocks, shares and securities to an American Corporation styled the Bema Corporation in consideration of 1000 shares therein, the whole of the authorized capital of the corporation, and it was admitted that that transfer was effected to enable her to avoid income tax and sur-tax in the United Kingdom. The appellant also possessed certain real property in the United States of America, and in 1935 she formed another corporation in the United States called the Babmac Realty Corporation, which took over this real estate. All the issued shares in that company were held by her. The property transferred to the company was not income-producing. In November, 1935, the appellant executed a settlement in the United States under which the Brooklyn Trust Company was appointed trustee and she transferred all her shares in the Bema Corporation to the trustee on trust (inter alia) to pay the income to her for life. The object of the execution of this settlement was the avoidance of British death duties. No dividend was declared by the Bema Corporation until January 25, 1936, when a dividend of $200,000 was declared. That dividend was paid to the trustees of the 1935 trust as the registered owners of the shares in the corporation. On instructions from the appellant, the trustees did not pay the money to her pursuant to the terms of the 1935 trust, but they paid it to the Babmac Realty Corporation.

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(1) By the Finance Act, 1936, s. 18: "For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows:—

"(1.) Where such an individual has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights by virtue of which he has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all the purposes of the Income Tax Acts: Provided that this subsection shall not apply if the individual shows . . . . to the satisfaction of the Special Commissioners that the transfer and any associated operations were effected mainly for some purpose other than the purpose of avoiding liability to taxation."

The Commissioners gave their decision as follows: "This "is an appeal against an assessment to sur-tax for the year "1935–36, made on the appellant to include income of an "American company called the Bema Corporation, deemed by "the provisions of s. 18 of the Finance Act, 1936, to be income "of the appellant. The appellant claims the benefit of the "proviso to s. 18, sub-s. 1, but, in view of the fact that the "transfer of assets by the appellant to the Bema Corporation "was admittedly made for the avoidance of taxation, we hold "that, on the authority of *Cottingham* (*Executors*) v. *Inland* "*Revenue Commissioners* (1) the proviso cannot be invoked. "On the evidence before us, we hold that the income in question "falls within the provisions of s. 18 and that the assessment "appealed against is rightly made to include the dividend of "$200,000 declared by the Bema Corporation on January 25, "1936, and also the income of that corporation from that date "to April 5, 1936." The parties having agreed the figures, the Commissioners later reduced the assessment to 46,091*l.*

At the request of the appellant, the Commissioners stated this case for the opinion of the Court.

Raymond Needham K.C. and *Scrimgeour* for the appellant. The Commissioners were wrong. The appellant had not, by means of a transfer of assets within s. 18, sub-s. 1, of the Finance Act,

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(1) [1939] 1 K. B. 250.

1936, acquired rights by virtue of which she had power to enjoy any income of a person resident or domiciled out of the United Kingdom within the meaning of the section. It is true that before the 1935 transfer the appellant was assessable under r. 1 of the Rules applicable to Case V. of Schedule D to the Income Tax Act, 1918, in respect of income arising from stocks, shares or rents out of the United Kingdom, and that after that transfer she was assessable in, possibly, a smaller sum under r. 2 in respect of income arising from possessions out of the United Kingdom other than stocks, shares or rents, but a transfer of assets which alters the basis of assessment is not one effected to avoid liability to taxation. Moreover, the 1935 transfer was effected to avoid liability to death duties and death duties are not "taxation" within the proviso to s. 18, sub-s. 1, which must be interpreted according to the purport and scope of its context: per Sir W. Page Wood V.-C. in *Cope* v. *Doherty*. (1) Part II. of the Finance Act, 1936, which includes s. 18, is headed "Income Tax," and s. 18 is expressed to be directed against avoidance of "liability "to income tax." Therefore, taxation in the proviso must be construed as meaning only income tax and sur-tax and not death duties which are outside the scope of the Income Tax Acts. For these reasons the appellant is entitled to the exemption afforded by the proviso to s. 18, sub-s. 1. Admittedly, the 1932 transfer was to avoid income tax, but that did not affect the 1935 transfer, for *Cottingham* (*Executors*) v. *Inland Revenue Commissioners* (2) is distinguishable on the facts.

Sir Terence O'Connor S.-G., *J. H. Stamp* and *R. P. Hills* for the Crown. The Commissioners were right. Sect. 18, sub-s. 1, clearly applies. The appellant was ordinarily resident in the United Kingdom and she, by means of the 1932 transfer in conjunction with the 1935 transfer, acquired rights as cestui que trust under the settlement, by virtue of which she had power to enjoy the income of the trust company which is resident or domiciled out of the United Kingdom. If the income on which the appellant has been assessed were her income received by her in the United Kingdom, she would be chargeable to tax in respect of it, and that income is, therefore, to be deemed to be

(1) (1858) 4 K. & J. 367, 375.

(2) [1939] 1 K. B. 250.

her income for all the purposes of the Income Tax Acts. The proviso to s. 18, sub-s. 1, does not avail her. First, the 1935 transfer was effected to avoid liability to taxation within the proviso. "Taxation" is a general term. Where income tax and sur-tax is referred to in the statute, they are referred to by those names. Therefore, "taxation" must have been deliberately used by the Legislature to convey a wide meaning and it must be interpreted as meaning "all taxation" which would include death duties. Secondly, the 1932 transfer admittedly was effected to avoid liability to income tax and sur-tax and the associated operation, the 1935 transfer, was, accordingly, tainted: *Cottingham (Executors)* v. *Inland Revenue Commissioners*. (1)

Needham K.C. replied.

Cur. adv. vult.

1940. April 27. Macnaghten J. The question at issue in this case is whether an assessment to sur-tax in the sum of 46,091*l.*, for the year ended April 5, 1936, made on the appellant, Mrs. Helen Babbott MacDonald, is correct. That question depends on the true meaning and effect of s. 18 of the Finance Act, 1936.

[His Lordship read s. 18, sub-s. 1, and continued :] It is to be observed that the section has no application to any transfer of assets unless (1.) it is a transfer made by an individual ordinarily resident in the United Kingdom, and (2.) by virtue or in consequence of the transfer (either alone or in conjunction with associated operations) income becomes payable to persons resident or domiciled out of the United Kingdom. But, if those two conditions are fulfilled, subject to the proviso, the income so payable is to be deemed to be the income of the transferor for the purpose of the Income Tax Acts.

Since her marriage in 1924, the appellant has made two transfers of assets whereby income became payable to persons resident outside the United Kingdom. The first was made in 1932. That transfer of assets plainly comes within the provisions of s. 18 of the Finance Act, 1936. The transferor was an individual ordinarily resident in the United Kingdom, and by means of the transfer income became payable to a company resident and domiciled out of the United Kingdom. It was admitted that this transfer was made by the appellant for the purpose of avoiding her liability to income tax in this country and that the proviso to sub-s. 1, therefore, could not apply. Accordingly, the income received by the Bema Corporation in consequence of the transfer must be deemed to be the income of the appellant.

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(1) [1939] 1 K. B. 250.

Sub-s. 7 of s. 18 is in these terms: "The provisions of "this section shall apply for the purposes of assessment to income "tax for the year 1935–36 and subsequent years, and shall "apply in relation to transfers of assets and associated opera-"tions whether carried out before or after the commencement "of this Act: Provided that, for the year 1935–36, no income "shall be charged to tax at the standard rate by virtue of the "provisions of this section, but sur-tax shall be assessed and "charged as if any income which would, but for this proviso, "have been charged as aforesaid had in fact been so charged." There is no dispute that the transfer of 1932 was a transfer of the class described in s. 18, and that the income of the Bema Corporation must be deemed to be the appellant's income as from the date when under sub-s. 7 the provisions of the Act took effect.

In November, 1935, the appellant transferred all her shares in the Bema Corporation to another American company, the Brooklyn Trust Company, to be held by them on the trusts set out in an agreement made between her and the company dated November 16, 1935, namely, on trust for herself for life, and after her death on trusts for her husband and the children of the marriage. The appellant reserved to herself full power to revoke these trusts, and, lest the Bema Corporation should do anything of which she might not approve, she stipulated that the Brooklyn Trust Company, as the holders of the shares of the Bema Corporation, should appoint her to be their proxy, and she reserved to herself the right, when acting as proxy for the Brooklyn Trust Company, to do what pleased herself. This transfer of the shares of the Bema Corporation to the

Brooklyn Trust Company was, however, made not to avoid liability to income-tax, but to escape liability to death duties in this country. From 1932 to the beginning of 1936 the Bema Corporation accumulated the income which it had received from the assets transferred to it by the appellant, but in January, 1936, the corporation declared a dividend of $200,000 and paid that dividend to the Brooklyn Trust Company. The Special Commissioners have decided that this dividend ought to be included in the appellant's assessment to sur-tax for the year 1935–36, and the question on this appeal is whether that decision was correct in law.

Although the Commissioners have found that the transfer to the Brooklyn Trust Company was not made to avoid liability to income tax, but to avoid liability to British death duties, it is nevertheless urged on behalf of the Crown that the proviso to sub-s. 1 of s. 18 does not apply to that transfer. The proviso only comes into effect if the Commissioners are satisfied "that the transfer and any associated operations "were effected mainly for some purpose other than the purpose "of avoiding liability to taxation," whereas in the preamble of the section its purpose is declared to be to prevent the avoidance of "liability to income tax." It is argued that the proper construction of the word " taxation " in the proviso is that it includes death duties as well as income tax. Death duties, no doubt, come within the meaning of the word "taxation " and the Crown rely on the alteration of the words "liability to income tax" to "liability to taxation" as showing that that is what was meant. On the other side, it is argued that s. 18 is one of the sections comprised in Part II. of the Finance Act, 1936, and that that part of the Act deals only with income tax ; that the section merely makes provision for preventing the avoidance of liability to income tax ; and that, therefore, the word " taxation " in the proviso ought to be read as meaning income tax and income tax only. The arguments on the one side and the other are almost evenly balanced, but on the whole the contention put forward on behalf of the appellant is, I think, to be preferred. In my opinion, therefore, s. 18 does not apply to the transfer of the appellant's shares in the Bema Corporation to the Brooklyn Trust Company.

The next point taken on behalf of the Crown is that the transfer to the Brooklyn Trust Company was an " associated "operation " within the meaning of those words as defined in s. 18, sub-s. 2. The definition of the meaning of those words is extremely wide. It is in the following terms : " For the "purposes of this section an associated operation means, in "relation to any transfer, an operation of any kind effected "by any person in relation to any of the assets transferred "— in this case the assets transferred in 1932 were the appellant's stocks, shares, and securities in American companies—" or "any assets representing, whether directly or indirectly, any "of the assets transferred "—the shares of the Bema Corporation, I take it, in 1935 represented perhaps directly but certainly indirectly, the American stocks, shares and securities which originally belonged to the appellant—" or "to the income arising from any such assets, or to any assets "representing, whether directly or indirectly, the accumulations "of income arising from any such assets." It seems to me that the transfer of the stock of the Bema Corporation to the Brooklyn Trust Company comes within the wide terms of that definition of the otherwise obscure expression " an "associated operation," and that, therefore, by means of the transfer to the Bema Corporation in 1932 and the " associated "operation " in 1935 income became payable to the Brooklyn Trust Company which the appellant has been able to enjoy within the meaning of s. 18.

To bring the proviso to sub-s. 1 into operation, it is necessary for the appellant to show, not merely that the " associated "operation " was made mainly for some purpose other than the purpose of avoiding liability to taxation, but that both the transfer and the associated operation were effected mainly for some purpose other than the purpose of avoiding liability to income tax : *Cottingham (Executors)* v. *Inland Revenue Commissioners*. (1) One of the points which had to be decided in that case was whether, to bring a case within the proviso

(1) [1939] 1 K. B. 250.

to sub-s. 1, it was necessary for the "individual" to show that both the transfer and the "associated operations" were made mainly for a purpose other than the purpose of avoiding liability to income tax, and Lawrence J. held that the fact that some of the associated operations were not concerned with avoidance of taxation did not remove the transfer of assets from the operation of s. 18. On appeal that decision was affirmed, Sir Wilfrid Greene M.R. saying that he did not deem it necessary to do more than say that he agreed with the conclusions of Lawrence J., and with the reasons which he had given for them. The reasons as expressed by Lawrence J. were these (1): "Moreover, the proviso is expressed in the "affirmative: the individual must show that the transfer and "any associated operations were effected mainly for some "purpose other than the purpose of avoiding taxation. These "words are, in my opinion, capable of meaning that both the "transfer and the associated operations were effected mainly "for some purpose other than avoiding taxation, and in view "of the avowed purpose of the section, of the contrast between "the words of the proviso and the words used earlier in the "section, of the wide definition is sub-s. 2 of associated "operations, and of the difficulty of deciding what is the main "purpose of such diverse transactions, I am of opinion that "this is the true interpretation."

It was urged on behalf of the appellant that neither the transfer of her assets to the Bema Corporation nor the transfer of the shares of the Bema Corporation to the Brooklyn Trust Company did avoid her liability to income tax. If the transfer to the Brooklyn Trust Company had not been made, the effect of the transfer of her assets to the Bema Corporation would have been that, when the dividend of $200,000 was declared and paid in January, 1936, the appellant would have been assessable to income tax under r. 1, Case V., which provides: "The tax in respect of income arising from stocks, shares or "rents in any place out of the United Kingdom shall be "computed on the full amount thereof whether the income "has been or will be received in the United Kingdom or not."

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(1) [1938] 2 K. B. 697.

Therefore, she contends, she would have had to pay income tax on that dividend, and all that the transfer to the Brooklyn Trust Company did was that, while the dividend still remained subject to British income tax, the computation would have to be made under r. 2, instead of r. 1, on income arising from possessions out of the United Kingdom, other than stocks, shares or rents. It is true that if the computation was made under r. 2 the appellant would not be liable to tax unless she received the income in the United Kingdom, and she had, in fact, disposed of the income by directing the Brooklyn Trust Company to pay over the dividend to the Babmac Realty Corporation of which she was the only stockholder. That argument, as it seems to me, does not touch the question at issue. Sect. 18 expressly provides that the income payable to the person resident or domiciled out of the United Kingdom is to be deemed to be the income of the individual who made the transfer of assets "whether it would or would not have "been chargeable to income tax apart from the provisions of "this section." So the fact that this dividend would have been chargeable to income tax apart from the provisions of the section does not have the effect of making it cease to be chargeable under the section.

The conclusion at which I have arrived is that the Special Commissioners were right and that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Linklaters & Paines.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

G. F. L. B.

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Feb. 12, 13, 14;
Mar. 1.

IMPERIAL SMELTING CORPORATION, LIMITED *v.* JOSEPH CONSTANTINE STEAMSHIP LINE, LIMITED.

Ship—Charterparty—Frustration—Explosion causing frustration—No evidence of cause of explosion—Default or otherwise in party setting up frustration—Onus of proof.

Where the doctrine of frustration is relied on, the onus of showing that the event which caused it took place without default in the party setting it up does not lie on that party. It is for the other party to the proceedings to show that the party setting up the doctrine was in default.

Hence, where charterers claimed from shipowners damages for failure to load and the shipowners pleaded that an explosion in the ship had frustrated the chartered voyage, and it was impossible to establish the cause of the explosion :—

Held, that the charterers had failed to discharge the onus which was on them and their claim failed.

SPECIAL CASE stated by an arbitrator, under s. 9, sub-s. 1 (*b*), of the Arbitration Act, 1934.

By a charterparty dated August 5, 1936, Joseph Constantine Steamship Line, Ld. (" the owners "), chartered their steamship *Kingswood* to Imperial Smelting Corporation, Ld. (" the " charterers "), to proceed to Port Pirie, South Australia, to load a cargo as therein provided. On December 26, 1936, the *Kingswood* anchored in the roads at Port Pirie. After certain negotiations it was agreed that the steamer should remain at the anchorage until January 4, 1937, and should then proceed to her berth. At approximately 8.55 A.M. on January 3, 1937, while the steamer was still anchored in the roads, there occurred an explosion of extreme violence from the auxiliary boiler which resulted in such delay that, as was admitted by the charterers, the commercial object of the adventure was frustrated. On the return of the ship to England a Board of Trade inquiry was held under the Boiler Explosions Acts, 1882 and 1890, and this was followed by arbitration consequent on a claim by the charterers against the shipowners for failure to load. It was agreed that the *Kingswood* never became an " arrived ship."

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IMPERIAL SMELTING CORPORATION, LD. *v.* JOSEPH CONSTANTINE STEAMSHIP LINE, LD.

In the case the arbitrator found as follows: "Neither those "who were responsible for conducting the Board of Trade "inquiry, nor any of the witnesses who gave evidence before "me, claimed to be able to state with any certainty the causes "of the disaster, or the sequence of events that led up to it. "The explosion was one of an unprecedented character and "no sequence of events which was other than improbable "was suggested as capable of having given rise to it. The "matter was rendered still more difficult by reason of the "fact that the donkeyman who on the morning in question "was the only person to be in the stokehold during the ninety "minutes preceding the explosion was not available as a "witness."

The case set forth the various contentions and hypotheses as to the cause of the explosion, and the arbitrator stated; "I am not satisfied that the true cause of the disaster has as "yet been suggested."

Subject to this case the arbitrator awarded that the charterers were entitled to damages.

Sir Robert Aske K.C. and *P. A. Devlin* (for *A. A. Mocatta* on war service) for the shipowners. This case comes within the principle of *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1), namely, that where anything occurs which is of such a character as, if contemplated by the parties, would have caused the inclusion of a term in the contract that it should put an end to it, then such a term ought to be implied, and the shipowners be entitled to plead frustration. It is admitted that if any act or negligence of the shipowners had caused the explosion, they could not rely on the doctrine of frustration: *Maritime National Fish, Ld.* v. *Ocean Trawlers, Ld.* (2), *Brook's Wharf and Bull Wharf, Ld.* v. *Goodman Brothers* (3), *Mertens* v. *Home Freeholds Co.* (4) But it is for the charterers to prove that act of negligence; the onus is not on the shipowners here to show that the explosion occurred without their default. The legal presumption is that the shipowners acted rightly,

(1) [1917] 2 K. B. 1.
(2) [1935] A. C. 524.
(3) [1937] 1 K. B. 534.
(4) [1921] 2 K. B. 526.

and it is for the charterers to show that the shipowners' default was the cause of the explosion. The charterers have failed to discharge that onus, because they have failed to establish any cause for the explosion. In *Taylor* v. *Caldwell* (1) Blackburn J. said that "every obligation de certo corpore is "extinguished when the thing ceases to exist." He did not add "without default of the defendant." That shows that it is for the plaintiff to show that the frustration was through the default of the defendant. It is true that in that case the defendants pleaded that the frustration arose "without the "default of the defendants" (2), but it was obvious that the point would arise and the pleader may have thought it convenient to plead it. It does not follow that it was necessary to plead it.

[ATKINSON J. referred to *Nickoll and Knight* v. *Ashton, Edridge & Co.*, per A. L. Smith M.R. (3)]

The shipowners are not bound to prove a negative. If, however, the onus is on them the arbitrator ought to have held that they had discharged it.

Apart from frustration, the explosion was an "accident of "navigation" within the exceptions clause 7 in the charterparty: see Carver's Carriage by Sea, 8th ed., p. 148, and *The Southgate*. (4) The accident happened during the course of the voyage. Furthermore, clause 2 (*a*), of art. IV. of the schedule to the Carriage of Goods by Sea Act, 1924 (5), applies.

G. St. C. Pilcher K.C. and *Charles Stevenson* for the charterers. The *Kingswood* was never an arrived ship; therefore the only possible defence is frustration. The onus is on the shipowners to show that the accident which rendered performance

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(1) (1863) 3 B. & S. 826, 837.

(2) Ibid. 828.

(3) [1901] 2 K. B. 126.

(4) [1893] P. 329.

(5) Carriage of Goods by Sea Act, 1924 (14 & 15 Geo. 5, c. 22), Sch., art. IV., clause 2 (*a*): "Neither the carrier nor the ship "shall be responsible for loss or "damage arising or resulting from "(*a*) Act, neglect, or default of the "master, mariner, pilot, or the "servants of the carrier in the "navigation or in the management "of the ship."

Art. IV., clause 2 (*a*) of the Schedule to the Australian Sea-Carriage of Goods Act, 1924 (referred to in the judgment) is in identical terms.

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impossible occurred without any default on their part. In other words, they must show that the boiler blew up without any negligence of theirs. In *The Merchant Prince* (1) the defendants' vessel ran into the plaintiffs' vessel while the latter was at anchor. The defendants pleaded inevitable accident in that the steering gear had jammed. This gear system had been in use for some years and had been found to work well, and before the accident this particular gear had been examined and tested, and after the accident competent examination had failed to discover the cause of the jamming. Nevertheless the defendants lost. Fry L.J. said (2): "[the defendants] must either show what was the "cause of the accident, and show that the result of that "cause was inevitable; or they must show all the possible "causes, one or other of which produced the effect, and must "further show with regard to every one of these possible "causes that the result could not have been avoided." In cases of impossibility of performance the proper plea is that it was brought about without default of the defendant: see the fifth plea in *Taylor* v. *Caldwell.* (3) In the present case there is a prima facie case of negligence against the shipowners under the maxim res ipsa loquitur, which they have not rebutted.

P. A. Devlin replied.

Cur. adv. vult.

1940. March 1. ATKINSON J. This is a special case stated by an arbitrator to determine a question of liability for a claim for damages by the charterers against the owners of a ship for failure to load a cargo. The charterparty is dated August 5, 1936, and was an agreement between the respondents, Joseph Constantine Steamship Line, Ld., the owners of the vessel *Kingswood,* and certain agents for the claimants, the Imperial Smelting Corporation, Ld. It provided that the vessel should be ready at Port Pirie, South Australia, for the purposes of the charterers and there load a full cargo of a certain description. The vessel was estimated to arrive at Port Pirie about the end of December, or early January.

(1) [1892] P. 179. (2) Ibid. 189. (3) 3 B. & S. 826, 827.

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Atkinson J.

There was an exceptions clause, clause 7: "The act of "God," and then various other exceptions are mentioned, ending up with "and other accidents of navigation excepted, "even when occasioned by the negligence, default, or error "in judgment of the pilot, master, mariners, or other servants "of the owners . . . . and all the above exceptions are "conditional on the vessel being seaworthy when she sails "on her voyage; but any latent defects in the machinery, "hull, or tackle shall not be considered unseaworthiness: "provided the same did not result from want of due diligence "of the owner or owners, or any of them, or of the ship's "husband or manager." The other relevant clause is clause 29: "This charterparty is to be read and construed "as if every clause therein contained which is rendered illegal "or null and void by the Sea Carriage of Goods Act, 1924, "had never been inserted therein or had been cancelled and "eliminated therefrom prior to the execution thereof. This "charterparty is subject to the terms and provisions of the "Sea-Carriage of Goods Act, 1924 (Australia), and the "conditions thereby implied in the bill of lading shall be "deemed to form part of and be incorporated in this charter."

The ship left the Tyne for Durban in October, 1936. She proceeded with cargo to Lorenço Marques, and in the first week of December sailed from there in ballast for Port Pirie to load the cargo provided for by the charterparty. The *Kingswood* anchored in the roads of Port Pirie on December 26, and on the following day the master tendered what purported to be a notice of readiness. This was not accepted as a proper notice, and it was agreed that the steamer should remain at anchorage until January 4, and should then proceed to her berth. It was agreed in the case before me that the steamer never became "an arrived ship." The case finds that "at "approximately 8.55 A.M. on Sunday, January 3, 1937, while "the steamer was still anchored in the roads, there occurred "an explosion of extreme violence from the auxiliary boiler." [His Lordship read the findings set out in the case and continued:] The shipowners gave notice that they could not perform the charterparty, and it was agreed between the claimants and the shipowners that the delay caused by the damage to the steamer was such as to frustrate the commercial object of the adventure. As the steamer could not be repaired in Australia, she was brought back to this country, and there was the usual examination by surveyors for both parties, also a Board of Trade inquiry under the Boiler Explosions Acts, 1882 and 1890, and there has been a long inquiry before the arbitrator in this case. The result of that inquiry before the arbitrator is expressed in the case: "Neither those who were "responsible for conducting the Board of Trade inquiry, nor "any of the witnesses who gave evidence before me, claimed "to be able to state with any certainty the causes of the "disaster, or the sequence of events that led up to it. The "explosion was one of an unprecedented character and no "sequence of events which was other than improbable was "suggested as capable of having given rise to it."

The question of law involved in this case arises in this way. The claimants claim damages for failure to load. The shipowners plead the destruction of the ship as a navigable unit and contend that the contract was thereby frustrated without liability on their part. They also rely on the exceptions clause and the articles of the schedule to the Australian Sea-Carriage of Goods Act, 1924 (Act No. 22). (1) The claimants, in reply, say that the frustration arose from the default of the shipowners, and that they are not entitled, therefore, to rely upon it as a defence to the claim.

The general rule is that impossibility of performance is no answer to a claim for breach of contract. But there are certain exceptions to the rule, and among them certainly are personal contracts, where performance necessarily depends on the contractor being alive and in sufficiently good health to perform his contract and performance becomes impossible through death or illness, and also contracts where the possibility of performance necessarily depends on the continued existence of a specific subject-matter and the performance becomes impossible owing to the destruction of that subject-matter. In such cases the contract or the adventure contemplated by the contract is said to be frustrated, the contract is at an end, and no action lies for damages for breach. But, to quote Lord Sumner in *Bank Line, Ld.* v. *Arthur Capel & Co.* (1): "I think it is now well settled that the principle of "frustration of an adventure assumes that the frustration "arises without blame or fault on either side. Reliance cannot "be placed on a self-induced frustration; indeed, such conduct "might give the other party the option to treat the contract "as repudiated."

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(1) Substantially identical with the Carriage of Goods by Sea Act, 1924.

In *Maritime National Fish, Ld.* v. *Ocean Trawlers, Ld.* (2), the facts of which are not very material for my purpose, Lord Wright said this (3): "The essence of 'frustration' is "that it should not be due to the act or election of the party. "There does not appear to be any authority which has been "decided directly on this point. There is, however, a reference "to the question in the speech of Lord Sumner in *Bank Line,* "*Ld.* v. *Arthur Capel & Co.*" (1), and then he reads the passage which I have just read. He goes on: "A reference to the "record in the House of Lords confirms Lord Sumner's view "that the Court below had not considered the point, nor had "they evidence or material for its consideration. Indeed, in "the war time the Admiralty, when minded to requisition a "vessel, were not likely to give effect to the preference of an "owner, but rather to the suitability of the vessel for their "needs or her immediate readiness and availability." The point arose in the *Bank Line* case (1) because the Admiralty wanted three trawlers and the defendants had selected the three which should be handed over, one of the three being the subject of the contract on which the action was brought. "However," Lord Wright continued, "the point does directly "arise in the facts now before the Board, and their Lordships "are of opinion that the loss of the *St. Cuthbert's* licence can "correctly be described, quoad the appellants, as 'a self "'induced frustration'. Lord Sumner in *Hirji Mulji* v. "*Cheong Yue Steamship Co.* (4) quotes from Lord Blackburn in

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(1) [1919] A. C. 435, 452.
(2) [1935] A. C. 524.
(3) Ibid. 530.
(4) [1926] A. C. 497, 507.

"*Dahl* v. *Nelson, Donkin & Co.* (1), who refers to a 'frustration' "as being a matter 'caused by something for which neither " 'party was responsible': and again he quotes Brett J.'s "words [in *Jackson* v. *Union Marine Insurance Co., Ld.* (2)], "which postulate as one of the conditions of frustration that "it should be 'without any default of either party.' It would "be easy, but is not necessary, to multiply quotations to the "same effect. If either of these tests is applied to this case, "it cannot in their Lordships' judgment be predicated that "what is here claimed to be a frustration, that is, by reason "of the withholding of the licence, was a matter for which the "appellants were not responsible or which happened without "any default on their part. In truth, it happened in consequence of their election. If it be assumed that the "performance of the contract was dependent on a licence "being granted, it was that election which prevented performance, and on that assumption it was the appellants' "own default which frustrated the adventure: the appellants "cannot rely on their own default to excuse them from liability "under the contract."

In passing it will be noticed that Lord Sumner said that reliance cannot be placed on a frustration which is self-induced. He does not say "on a frustration which is not proved to be "not self-induced." The passage which I have read from Lord Wright's judgment seems to me to imply the same idea, that the frustration which cannot be relied on is one proved affirmatively to be self-induced. There, of course, the facts showed conclusively that there had been a self-induced frustration.

It was agreed before me that the main question of law raised by the case is this: Is it for the person who has failed to perform his contractual obligation and is setting up a case of frustration to prove affirmatively, not only that performance became impossible owing to circumstances bringing him within the second of the exceptions I have indicated, but also that the impossibility was not due to any negligence on his part, or is it for the party claiming damages to prove that the impossibility was due to the negligence of the defaulting party? That is the main point of law raised, and both sides agree that there is no direct authority on it.

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(1) (1881) 6 App. Cas. 38, 53.

(2) (1873) L. R. 8 C. P. 572, 581.

Supposing a ship, the subject-matter of a charterparty such as this, is lost with all hands on the outward voyage, nothing being known of the circumstances from which any inference can be drawn, does the shipowner lose because he cannot disprove negligence, or does the charterer lose because he is unable to prove negligence? I might go a step further. Supposing a ship is lost with all hands by striking a mine, is the shipowner to prove that a proper watch was being kept, and that the ship was being navigated with proper skill to succeed in establishing frustration, or has the charterer to prove that there was some negligence in the navigation or look-out which was responsible for the loss? Perhaps it is not yet finally settled whether the true basis on which the doctrine of frustration of contract rests is a term to be implied into the contract, or whether it arises by operation of law as soon as it appears that the basis of the contract has gone.

In *Blackburn Bobbin Co., Ld.* v. *T. W. Allen & Sons, Ld.* (1), McCardie J., in putting the principle, said this: "It was put "with clearness by Lord Shaw in *Horlock* v. *Beal* (2) where "he said: 'The underlying ratio is the failure of something " 'which was at the basis of the contract in the mind and " 'intention of the contracting parties.' It was stated with "equal clearness by Lord Haldane in *F. A. Tamplin Steamship* "*Co.* v. *Anglo-Mexican Petroleum Products* Co. (3) where he said: " 'The occurrence itself may . . . . be of a character and " 'extent so sweeping that the foundation of what the parties " 'are deemed to have had in contemplation has disappeared, " 'and the contract itself has vanished with that foundation.' "In every case it is now necessary 'to examine the contract " 'and the circumstances in which it was made, not of course " 'to vary, but only to explain it, in order to see whether " 'or not from the nature of it the parties must have made

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(1) [1918] 1 K. B. 540, 545.
(2) [1916] 1 A. C. 486, 512.
(3) [1916] 2 A. C. 397, 406.

" ' their bargain on the footing that a particular thing or " ' state of things would continue to exist. And if they must " ' have done so, then a term to that effect will be implied, " ' though it be not expressed in the contract ' : per Lord "Loreburn in the *Tamplin* case. (1) " We have there three quotations, the first two from Lord Shaw and Lord Haldane, putting the principle on the basis of the foundation of the contract having disappeared, and the third from Lord Loreburn, suggesting that a term to the same effect would be implied into the contract.

Branson J. pointed out in *Court Line, Ld.* v. *Dant and Russell Incorporated* (2) that the Court of Appeal in *Comptoir Commercial Anversois* v. *Power Son & Co.* (3) had decided in favour of the latter view, and said that, so far as a judge of first instance was concerned, the matter was concluded. If I accept that as right, it means that some term has to be implied into the contract. But in what words is the implied term to be deemed to be expressed ? Are they to be words simply indicating that the destruction of some specific subject-matter shall put an end to the contract, or should they indicate that the continued existence of the specific subject-matter shall be deemed to be the basis of the contract ? Does negligence become relevant merely on the same principle that a man cannot rely on an exceptions clause if his negligence has caused the excepted event, or must the implied term be deemed to contain words putting on the party seeking to be relieved the burden of disproving negligence, that is to say, of proving frustration without default, and how far has that proof to go ?

I must seek what guidance I can from analogous cases. On the one hand, I have cases under s. 502 of the Merchant Shipping Act, 1894. That section provides : "The owner of "a British sea-going ship . . . . shall not be liable to make "good to any extent whatever any loss or damage happening "without his actual fault or privity " in certain specific circumstances. It has been held that the onus of disproving

(1) [1916] 2 A. C. 403.
(2) (1939) 44 Com. Cas. 345, 350.
(3) [1920] 1 K. B. 868.

actual fault or privity is on the shipowner. The first case in which that was held was *Asiatic Petroleum Co., Ld.* v. *Lennard's Carrying Co., Ld.* (1) Hamilton L.J. dealt with the point showing that, at any rate, in his mind it was one which was not free from doubt (2): "Can it be said that the cargo "was burnt without the actual fault or privity of the owners? "Though I think that the whole onus lies on the shipowner "of proving as a defence loss by a fire, of which he can "predicate that it happened without his actual fault, and that "'without his actual fault or privity' in s. 502 of the Merchant "Shipping Act, 1894, differs in this respect from negligence "in connection with excepted perils in a bill of lading (*The* "*Glendarroch* (3)), I need not decide it, for the facts proved "are quite sufficient for the purpose, let the onus lie where "it may." In the House of Lords it was decided quite clearly that under that section the onus lay entirely on the owners setting up the section. That decision has been followed in *Paterson Steamships, Ld.* v. *Robin Hood Mills* (4) and *Standard Oil Co. of New York* v. *Clan Line Steamers, Ld.* (5) The ratio of those decisions seems to be that the section creates a statutory exceptions clause and that it is for the person setting up the clause to bring himself within it.

On the other hand, there are many cases on exceptions clauses in charterparties and it is beyond dispute that when a loss apparently falls within an exception the burden of showing that the owner is not entitled to the benefit of the exception on the ground of negligence is on the person so contending: *The Glendarroch.* (3) It is difficult to see why the implied frustration term should be treated in the same way as a statutory exceptions clause rather than in the same way as an express exceptions clause. Again, if a prima facie case of perils of the sea is made out and the plaintiff alleges unseaworthiness, the proof is on the person alleging it: *The Northumbria.* (6) Consider, too, the cases of incapacity through illness. There the principle is the same, as is seen, for instance, in *Robinson* v. *Davison.* (1) Illness may well be due to neglect, but it has never been suggested that a person setting up illness as frustrating the performance of a contract can be called on to prove an absence of fault on his part.

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(1) [1914] 1 K. B. 419; [1915] A. C. 705.

(2) [1914] 1 K. B. 436.

(3) [1894] P. 226.

(4) (1937) 58 Ll. L. Rep. 33.

(5) [1924] A. C. 100, 113.

(6) [1906] P. 292, 298.

Then there are the cases arising under s. 7 of the Sale of Goods Act, 1893. The language is very much the same, I suppose, as that in which the principle of frustration might be expressed even in an extreme form. Where there is an agreement to sell specific goods and subsequently the goods without any fault on the part of the seller or buyer perish before the risk passes to the buyer, the agreement is thereby avoided. Blackburn J., in *Taylor* v. *Caldwell* (2), referred, not of course to the section, but to the law which is embodied in the section as based on the same implication. It has not yet been suggested, so far as I can find in any case on that section that the general rules relating to negligence do not apply. Blackburn J. in *Taylor* v. *Caldwell* (3) referred, for example, to *Rugg* v. *Minett.* (4) In that case there is no suggestion whatever that the vendor had to prove that he was not responsible for the fire which had destroyed the goods sold, the property in them having passed. There have been many fire cases. *Taylor* v. *Caldwell* (2) was one. *Appleby* v. *Myers* (5) was another. I can find no suggestion in any of them that the person relying on fire as an excuse for his breach of contract has been called on to prove that the fire was in no way due to any negligence on his part.

Again, there are the bailee cases. They do not impose on a bailee anything like the burden which it is sought to impose on the person setting up frustration in this case. I want to refer to *Taylor* v. *Caldwell* (2) again. Blackburn J. dealt with the condition that ought to be implied or with what was the basis of the contract, and he said (6): "These are "instances where the implied condition is of the life of a

(1) (1871) L. R. 6 Ex. 269.

(2) (1863) 3 B. & S. 826; 2 Sm. L. C. (13th ed.) 601.

(3) 3 B. & S. 826, 837.

(4) (1809) 11 East 210.

(5) (1867) L. R. 2 C. P. 651.

(6) 2 Sm. L. C. (13th ed.) 609; 3 B. & S. 837.

"human being, but there are others in which the same "implication is made as to the continued existence of a thing. "For example, where a contract of sale is made amounting to "a bargain and sale, transferring presently the property in "specific chattels, which are to be delivered by the vendor "at a future day; there, if the chattels, without the fault "of the vendor, perish in the interval, the purchaser must "pay the price and the vendor is excused." He says that that rule of law was established by *Rugg* v. *Minett* (1) to which I have already referred. His judgment ended in this way (2): "The principle seems to us to be that, in contracts "in which the performance depends on the continued existence "of a given person or thing, a condition is implied that the "impossibility of performance arising from the perishing of "the person or thing shall excuse the performance. In none "of these cases is the promise in words other than positive, "nor is there any express stipulation that the destruction of "the person or thing shall excuse the performance; but that "excuse is by law implied, because from the nature of the "contract it is apparent that the parties contracted on the "basis of the continued existence of the particular person "or chattel. In the present case, looking at the whole "contract, we find that the parties contracted on the basis "of the continued existence of the music hall at the time "when the concerts were to be given; that being essential "to their performance." It will be noted that there is not a word said about negligence, or as to anything about proof of negligence, or disproof of negligence being deemed to be incorporated, yet it is quite clear from his earlier statement of the principle that impossibility of performance from the perishing of the thing had to be without the default of the contractor. The inference which one would draw from that is that the implication is simply that the destruction of the subject-matter terminates the contract, but that a person cannot rely on it if it is established that his own default really brought about that destruction. The judgment goes on: " We think, therefore, that the music hall having ceased "to exist, without fault of either party, both parties are "excused." It may be a trifling and small indication, but I think it is an indication that Blackburn J. is not treating the implied term as containing any reference to negligence, but merely as one that cannot be relied on, any more than an exceptions clause if the trouble has been brought about by the default of the party seeking to rely on it.

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(1) 11 East. 210.
(2) 2 Sm. L. C. (13th ed.) 611; 3 B. & S. 839.

Howell v. *Coupland* (1) was a potato case. It will be remembered that there was a sale of two hundred tons of regent potatoes to be grown on land belonging to the defendant at so much a ton to be delivered by September or October. In March the defendant had sixty-eight acres ready for potatoes which were planted and were amply sufficient to grow more than two hundred tons in an average year. In August potato blight appeared and the crop failed, so that the defendant was able to deliver only eighty tons. The plaintiff brought an action for the non-delivery of the other hundred and twenty tons, but he failed. The principle of *Taylor* v. *Caldwell* (2) was applied and nowhere was there a suggestion that there was any burden on the defendant to prove that his potatoes suffered from blight through no default of his own. In *Appleby* v. *Myers* (3) A had contracted to do work and supply materials on the premises of B for a specific sum to be paid on the completion of the whole. A had done part of the work when the building was destroyed by fire and he was claiming payment for what he had done and it was held that he had no claim because he was not entitled to payment until he had completed his contract and the impossibility of completing it had come about through the destruction of that which was essential for the performance of the contract. Blackburn J. said this (4): " We agree with the Court below in thinking "that it sufficiently appears that the work which the plaintiffs "agreed to perform could not be performed unless the "defendant's premises continued in a fit state to enable the

(1) (1874) L. R. 9 Q. B. 462.

(2) 3 B. & S. 826; 2 Sm. L. C. (13th ed.) 601.

(3) L.R. 2 C. P. 651.

(4) Ibid. 658.

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"plaintiffs to perform the work on them; and we agree with "them in thinking that, if by any default on the part of the "defendant, his premises were rendered unfit to receive the "work, the plaintiffs would have had the option to sue the "defendant for this default, or to treat the contract as "rescinded, and sue on a quantum meruit. But we do not "agree with them in thinking that there was an absolute "promise or warranty by the defendant that the premises "should at all events continue so fit. We think that where, "as in the present case, the premises are destroyed without "fault on either side, it is a misfortune equally affecting both "parties." It will be noted that Blackburn J. said (1): "We "agree with them in thinking that, if by any default on the "part of the defendant, his premises were rendered unfit to "receive the work." That this means some established default is clear from the end of the judgment where he says: "We think that, on the principles of English law "laid down"—*Cutter* v. *Powell* (2); *Jesse* v. *Roy* (3), and so on, "the plaintiffs, having contracted to do an entire work "for a specific sum, can recover nothing unless the work be "done, or it can be shown that it was the defendant's fault "that the work was incomplete, or that there is something "to justify the conclusion that the parties have entered into a "fresh contract."

In all the cases at which I have looked that is the only sentence I can find which clearly indicates on whom is the burden—"or it can be shown that it was the defendant's "fault that the work was incomplete." It was Blackburn J. who had laid down the principle in *Taylor* v. *Caldwell*. (4) When applying that principle in *Appleby* v. *Myers* (5) he used an expression which seems to me to indicate that it was his view that where a plaintiff claims damages as on a breach it is for him to prove that it was the defendant's fault that the work was incomplete. I can see myself no reason why the implied term should be so framed as to exclude the general

(1) L. R. 2 C. P. 658.

(2) (1795) 6 T. R. 320.

(3) (1834) 1 C. M. & R. 316.

(4) 3 B. & S. 826; 2 Sm. L. C. (13th ed.) 601.

(5) L. R. 2 C. P. 651.

rules governing the incidence of proof in the law of negligence, or why those rules should not apply to the problems raised in this case. Those rules have in the main been built up in actions for tort, but they apply equally where the question of breach of contract depends on whether there has or has not been negligence.

As a general rule a party seeking to recover compensation for damage must make out that the party against whom he complains was in the wrong. To quote Lord Wensleydale in *Morgan* v. *Sim* (1), "he must show that the loss is to be "attributed to the negligence of the opposite party. If at "the end he leaves the case in even scales and does not satisfy "the Court that it was occasioned by the negligence or default "of the other party, he cannot succeed." Bowen L.J. laid down some helpful rules relating to the onus of proof in *Abrath* v. *North Eastern Ry. Co.* (2): "Whenever litigation "exists, somebody must go on with it; the plaintiff is the "first to begin; if he does nothing, he fails; if he makes a "prima facie case, and nothing is done to answer it, the "defendant fails. The test, therefore, as to the burden of "proof or onus of proof, whichever term is used, is simply "this: to ask oneself which party will be successful if no "evidence is given, or if no more evidence is given than has "been given at a particular point of the case, for it is obvious "that as the controversy involved in the litigation travels on, "the parties from moment to moment may reach points at "which the onus of proof shifts, and at which the tribunal "will have to say that if the case stops there, it must be decided "in a particular manner. The test being such as I have "stated, it is not a burden that goes on for ever resting on "the shoulders of the person upon whom it is first cast. As "soon as he brings evidence which, until it is answered, rebuts "the evidence against which he is contending, then the balance "descends on the other side, and the burden rolls over until "again there is evidence which once more turns the "scale. That being so, the question of onus of proof is only

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(1) (1857) 11 Moore P. C. 307, 312.

(2) (1883) 11 Q. B. D. 440, 456.

"a rule for deciding on whom the obligation of going further, "if he wishes to, rests. It is not a rule to enable the jury to "decide on the value of conflicting evidence. So soon as a "conflict of evidence arises, it ceases to be a question of onus "of proof."

In such a case as this, the charterers begin by proving that the ship did not arrive within the contract time, or at all. If the case stopped there the charterers win, but the shipowners then prove an accident which destroyed the ship as a navigable unit. The owners prove an event which was the immediate, direct and dominant cause of that destruction. If the case stopped there, what is the position ? Who wins ? I do not think that the answer is a simple one, but, in my view, the onus of ultimately satisfying the tribunal that the ship was at fault rests on the charterers. Whether or not they have discharged that onus must be judged by applying the following principles. The first is this. If it appears that the accident proved was of such a nature as to raise a presumption of negligence, that is, to afford some evidence of negligence, the onus is on the owners to destroy that presumption. (2.) If it appears that the accident proved was of such a nature as to afford no evidence of negligence, the onus is on the charterers to prove negligence in fact. (3.) Where the onus is on the owners under the first principle, that onus is discharged by proving facts from which the inference that the accident was not caused by negligence is as equally strong, that is, equally consistent with the facts, as the inference that it was caused by negligence.

The first principle rests on the law laid down by Erle C.J. in *Scott* v. *London and St. Katherine Docks Co.* (1) which was this : "There must be reasonable evidence of negligence. "But where the thing is shewn to be under the management "of the defendant or his servants, and the accident is such as "in the ordinary course of things does not happen if those "who have the management use proper care, it affords "reasonable evidence, in the absence of explanation by the "defendants, that the accident arose from want of care."

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(1) (1865) 3 H. & C. 596, 601.

The proper inference to be drawn may be strong or it may be weak.

The Merchant Prince (1) is an example of a case where the inference was very strong. A ship navigating the entrance to the Mersey ran into a ship which was at anchor. I need not read the case, but the substance of it was that in a case of that kind, where there was, at any rate, apparent negligence which it was very difficult to explain, the presumption had to be got rid of, and the defendant was called on to prove that the accident was brought about by some cause for which he was not responsible, and he failed to do it. When the presumption ought to be drawn is illustrated by Willes J. in *Czech* v. *General Steam Navigation Co.* (2): "I will, however, assume that it is so for the purpose of "this case, but it does not, therefore, restrict the plaintiffs "as to the nature of the evidence by which such negligence "shall be proved. To explain this by an illustration. If a "shipment of sugar took place under a bill of lading, such "as the present one, and it was proved that the sugar was "sound when put on board, and had become converted "into syrup before the end of the voyage, if that was put "as an abstract case I think the shipowner would not be "liable, because there may have been storms which occasioned "the injury, without any want of care on the part of "the captain or crew; the injury alone, therefore, would "be no evidence of negligence on their part. But if it "was proved that the sugar was damaged by fresh water, "then there would be a strong probability that the hatches "had been negligently left open, and the rain had so come in "and done the injury, and, though it would be possible that "someone had wilfully poured fresh water down into the hold, "this would be so improbable that a jury would be justified "in finding that the injury had been occasioned by negligence "in the management of the ship." In other words, it must always depend on the circumstances whether or not a presumption of negligence is raised.

(1) [1892] P. 179. (2) (1867) L. R. 3 C. P. 14, 19.

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In *Ballard* v. *North British Ry. Co.* (1) there is to my mind a most illuminating judgment of Lord Dunedin on this point. He differed in his conclusion on the facts from the other members of the House, but what he said has been referred to again and again with approval. It was an action for damages. Negligence was alleged in the handling of railway trucks in a goods yard, but the facts do not really matter for the present purpose. Lord Dunedin said (2): "The foundation "of all actions of the kind we are considering must be "negligence on the part of the defender, and whether the "expression res ipsa loquitur is applicable or not depends "upon whether, in the circumstances of the particular case, "the mere fact of the occurrence which caused hurt or damage "is a piece of evidence relevant to infer negligence. Thus, "there is a class of cases dealing with injury occurring to a "servant owing to defective plant." He gives a number of illustrations and then he goes on: "Yet it is significant to "notice that these cases may be unduly applied, and Lord "Justice-Clerk Moncreiff found it necessary to correct the "tendency in *Macfarlane* v. *Thompson.* (3) The accident "there was due to a casing falling from the boiler on which "the pursuer was working and injuring him. His Lordship "had been a party to the judgments in *Fraser* v. *Fraser* (4) "and *Walker* v. *Olsen.* (5) Lord Craighill had said (6): 'It "'would, I think, be very unfair to the master to hold that "'where the cause of the accident was unascertained, or, it "'may be, unascertainable, it is to be held that that cause "'must necessarily have lain in some defect of the machinery, "'and that the master must therefore be found liable,' and "the Lord Justice-Clerk said (6): 'I only add to what Lord "'Craighill has said a single sentence for the purpose of "'explaining my meaning in the opinions [*sic*] I delivered in "'the cases referred to. It has been sought to interpret these "'opinions as authority to the effect that you must presume "'from the fact that an accident has occurred that there was

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(1) 1923 S. C. (H. L.) 43.
(2) Ibid. 53.
(3) (1884) 12 R. 232.
(4) (1882) 9 R. 896.
(5) Ibid. 946.
(6) 12 R. 235.

"'some defect in the machinery. I do not think that any "'such interpretation can be put upon what I said there. "'What I did say was that, provided that it is proved that "'some defect in the machinery or plant caused the accident, "'it is not necessary to shew the precise nature of that defect, "'and an onus is thrown upon the master to shew that the "'defect was one for which he was not to blame, but that is "'a totally different thing from saying [that] you must infer "'faults or defects in the machinery where there is no evidence "'to that effect in any of the surrounding circumstances'." Then he goes on a little lower down: "Taking the cases in "which the mere fact of the accident is relevant to infer "negligence, it is sometimes said, and the Lord Ordinary has "said it, that there is then raised a presumption of negligence "which the defender has got to rebut. I think that this is "too absolute a method of expressing the legal result in all "cases. It was this same feeling that, I think, led Lord Adam "to say in *Milne* v. *Townsend* (1): 'The res can only speak "'so as to throw the inference of fault upon the defender in "'some cases where the exact cause of the accident is "'unexplained.' If indeed 'relevant to infer' and 'necessarily "'infers' were the same thing, then I think it would be right "to say that, when an accident arises in cases where the "doctrine is applicable, then a presumption of fault would "arise which must be overcome by contrary evidence, and "that is the way that the Lord Ordinary has looked at the "matter. But 'relevant to infer' and 'necessarily infers' "are not synonymous, and the difference becomes of moment "in a case like the present. I think this is a case where the "circumstances warrant the view that the fact of the accident "is relevant to infer negligence. But what is the next step? "I think that, if the defenders can shew a way in which the "accident may have occurred without negligence, the cogency "of the fact of the accident by itself disappears, and the "pursuer is left as he began, namely, that he has to shew "negligence. I need scarcely add that the suggestion of how "the accident may have occurred must be a reasonable

(1) (1892) 19 R. 830, 836.

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"suggestion. For example, in *Scott* v. *London and St. Katherine* "*Docks Co.* (1), a case where a bag of flour fell on a man who "was passing along a quay in front of a warehouse, it would "not have been sufficient to say that the flour bag might "have fallen from a passing balloon. I think this view of "mine is borne out by the expressions used in *Scott* v. *London* "*and St. Katherine Docks Co.*" (1)

Then he quotes the principle which I have already read. The importance of *Ballard* v. *North British Ry. Co.* (2) lies in this, that it indicates when a presumption of negligence is rebutted. In Lord Dunedin's view it is rebutted if the defence can show a way in which the accident may have occurred without negligence. In the present case the ship and the boiler, being under the shipowners' management, and the explosion of a boiler being, perhaps, very unusual nowadays, I will assume that it affords some evidence of want of care. It is not necessary to come to any decision as to that, because in this case there has been a Board of Trade inquiry, a prolonged examination of the circumstances before an arbitrator, and certain findings, the result of which has been set forth in the case stated. With whatever inferences and presumptions an inquiry may start, however often the onus may shift as matters of evidence, the ultimate question must be: Has it been established that the respondents were to blame for the accident? In *Wakelin* v. *London and South Western Ry. Co.* (3) a woman was suing for the death of her husband, caused by the alleged negligence of the railway company. Lord Halsbury says (4): "It is incumbent upon "the plaintiff in this case to establish by proof that her "husband's death has been caused by some negligence of the "defendants, some negligent act, or some negligent omission, "to which the injury complained of in this case, the death of "the husband, is attributable. That is the fact to be proved. "If that fact is not proved the plaintiff fails, and if in the "absence of direct proof the circumstances which are established "are equally consistent with the allegation of the plaintiff as

(1) 3 H. & C. 596.
(2) 1923 S. C. (H. L.) 43.
(3) (1886) 12 App. Cas. 41.
(4) Ibid. 44.

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"with the denial of the defendants, the plaintiff fails." Then Lord Halsbury proceeds: "If the simple proposition with which "I started is accurate, it is manifest that the plaintiff, who "gives evidence of a state of facts which is equally consistent "with the wrong of which she complains having been caused "by—in this sense that it could not have occurred without— "her husband's own negligence as by the negligence of the "defendants, does not prove that it was caused by the "defendants' negligence. She may indeed establish that the "event has occurred through the joint negligence of both, "but if that is the state of the evidence the plaintiff fails." Then Lord Watson pointed out (1) that it is not merely enough to prove acts of negligence. The defendants "might be guilty "of many negligent acts or omissions, which might possibly "have occasioned injury to somebody, but had no connection "whatever with the injury for which redress is sought, and "therefore the plaintiff must allege and prove, not merely "that they were negligent, but that their negligence caused "or materially contributed to the injury." If in the result the scales are even, if the tribunal is unable to say that the facts are more consistent with negligence than with the absence of negligence, the plaintiff fails.

Brett J. in *Hanson* v. *Lancashire and Yorkshire Ry. Co.* (2) says (3): "It seems now to be clearly established that in order "to render the company liable for negligence it is necessary "to give affirmative proof of negligence on their part; and "it is not sufficient merely to prove the occurrence of an "accident, and to rely upon that as prima facie evidence of "negligence. In some cases, res ipsa loquitur, the accident "may be of such a nature as that negligence may be presumed "from the mere occurrence of it. But when the balance is "even, the onus is on the party who relies on the negligence "of the other to turn the scale." FitzGibbon L.J. in *Powell* v. *M'Glynn & Bradlaw* (4) says: "Where there are two hypotheses, "one involving and the other not involving the liability of a

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(1) (1886) 12 App. Cas. 41, 47.

(2) (1872) 20 W. R. 297, 298.

(3) Quoting from Hodges on Railways, 4th ed., 531.

(4) [1902] 2 I. R. 154, 190.

"defendant, each equally consistent with the evidence, the "plaintiff cannot get a verdict."

That principle has been applied in three or four recent cases. The first is *The Kite* (1), an Admiralty case, tried by Langton J. There had been a collision between a barge which was being towed and the buttress of an arch. The passage to which I want to refer is this (2): "Have the "plaintiffs proved that the defendants were negligent? "The plaintiffs say: 'You were towing the barge; the "'barge struck the bridge.' That I think is sufficient "to shift the burden of proof for the moment, and it is "for the defendants to give an explanation of how this "occurred. When they have given that explanation one has "still to see whether negligence has been proved. The "explanation may be disbelieved; the explanation may not "at all exclude negligence, but the explanation may leave "the matter still in some doubt as to exactly how the occurrence "did happen, but leave an equal possibility that it happened "without negligence as with negligence. It may, on the other "hand, be sufficient to exclude any question of negligence at "all. Those are all possibilities of what may result from the "explanation. Before I pass from that I will cite one more "case which I think is of great assistance in this question." Then he referred to *Ballard* v. *North British Ry. Co.* (3) and read that passage from Lord Dunedin's judgment which I have read, the one which contained the words (4): "If the defenders can "shew a way in which the accident may have occurred without "negligence," and so on, and applied it to the case before him.

The next case to which I want to refer (and this is a bailee case) is *Brook's Wharf and Bull Wharf, Ld.* v. *Goodman Brothers*. (5) There goods deposited in a warehouse had been stolen. The law, I think, is clear as to the position of a bailee in those circumstances. If he cannot produce the goods, he has to disprove negligence. He has to explain non-production in some way. The point of the case for my

(1) [1933] P. 154.
(2) Ibid. 168.
(3) 1923 S. C. (H. L.) 43.
(4) Ibid. 54.
(5) [1937] 1 K. B. 534.

purpose is that it shows how far he has to go in the disproof of negligence, and it may be difficult to suggest that a shipowner is in a worse position than a bailee. What is it that the bailee has to show? The judgment in *Brook's Wharf and Bull Wharf, Ld.* v. *Goodman Brothers* (1) was given by Lord Wright M.R.; and Romer L.J. and Macnaghten J., who were sitting in the Court of Appeal, both agreed with the judgment of the Master of the Rolls. The case had been tried by Branson J., who accepted the evidence of the defendants that they had a careful system under which normally goods were safe. But it was argued that there had been no explanation given of how the goods had been stolen and when they had been stolen. All the defendants had done was to say that they had a reasonably good system, but that was not sufficient. It was argued that they had not discharged the onus on them, because they had not explained how the goods had gone, how the thieves had got in, and so on. The Master of the Rolls said this (2): "In the present case, the stealing of the "goods being admitted, the plaintiffs have given evidence that "they have taken all reasonable precautions to protect the "goods against the risk of theft, and [the warehousemen] say "that they have satisfied the burden of proof which rests "upon them and that they are outside the rulings I have just "quoted." The bailees were suing for money due to them, and the bailors were counterclaiming for the value of the goods. The judgment continues: "They further rely on a statement of "the rule given (in a dissenting judgment, it is true) by Lord "Dunedin in *Ballard* v. *North British Ry. Co.*" (3) Lord Wright read the same passage and then he said: "I think "this is merely stating the same rule as that stated by Lord "Loreburn and Lord Halsbury from another aspect. If the "plaintiffs shew that they took all reasonable and proper care "of the goods, the mere fact that they were, notwithstanding, "stolen is not sufficient any longer to make them liable for "negligence. Their explanation is, then, that the thieves "must have shewn ingenuity and daring against which

(1) [1937] 1 K. B. 534.
(2) Ibid. 539.
(3) 1923 S. C. (H. L.) 54.

"reasonable precautions could not avail. Hence, I think the "plaintiffs discharge the burden of proof upon them if they "can shew that the theft took place notwithstanding that they "had taken all reasonable precautions to guard against the "danger." The point is this. If the bailee can show, as Lord Dunedin put it, that the loss may have happened without negligence on their part, then they have discharged the burden. In that case they were able to discharge the onus by saying "We have shown that we have a reasonable system."

Lord Wright had quoted certain passages from *Joseph Travers & Sons, Ld.* v. *Cooper.* (1) That is an illuminating case. Goods had been loaded into a barge, and the barge, while lying alongside the wharf, had sunk. The barge owners were being sued by the owners of the goods. Pickford J. had tried the case in the first instance. It was proved that the man who ought to have been on the barge in charge of it was not there. There were two theories as to how the barge had sunk. Mud sucking was one solution and underpinning another. Pickford J. had held that there was negligence proved because the man was not there, but he said: "I am unable to say that if he had "been there he would have been able to prevent this accident, "and, therefore, I cannot say that his negligence was the "cause of the accident," and so he found for the defendants. That decision was reversed in the Court of Appeal. Buckley L.J. said (2): "They have proved negligence, but the learned "Judge has held that they fail because they have not proved "that the negligence caused the loss. If the learned Judge "had enjoyed the assistance which we have of the decision "of the House of Lords in *Morison, Pollexfen and Blair* v. "*Walton* (3), decided on May 10, 1909, I doubt whether he "would have decided this point as he did. The language of "Lord Loreburn in that case seems to me to be directly in "point. It was a case in which a firefloat, which was being "towed, was lost, and the reason why she sank was unknown "because there was no one on board her as there ought to "have been. Lord Loreburn said: 'Here is a bailee who,

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(1) [1915] 1 K. B. 73.
(2) Ibid. 87.
(3) (1909) Unreported.

"'in violation of his contract, omits an important precaution, "'found by the learned Judge upon ample evidence to be "'necessary for the safety of the thing bailed to him and "'which might have prevented the loss. And his breach of "'contract has the additional effect of making it impossible "'to ascertain with precision and difficult to discover at all "'what was the true cause of the loss. I cannot think it is "'good law that in such circumstances he should be permitted "'to saddle upon the parties who have not broken their "'contract the duty of explaining how things went wrong. "'It is for him to explain the loss himself, and if he cannot "'satisfy the Court that it occurred from some cause "'independent of his own wrong-doing he must make that "'loss good'." Lord Halsbury had said the same thing. If the plaintiff prove negligence in the bailee, then it is for the bailee to prove that that negligence was not the cause of the loss. That principle was applied in *Joseph Travers & Sons, Ld.* v. *Cooper.* (1) I think that if in the interests of time I merely read a few words from Phillimore L.J.'s judgment (2) it will be sufficient. "And this gives rise to the question: On whom "was the burden of proof? It is here that I differ from the "learned Judge. I think he has imposed the burden of proof "on the wrong party. I think that when the bailee of goods "has to admit that the goods have been damaged while in "his custody and in the absence of the custodian, and it is "found that the absence was improper and negligent and that "that very absence makes it difficult to determine what was "the cause of the damage, and the owner can suggest a "probable cause which the presence of the custodian might "have prevented, the burden is upon the bailee to show that "it was not the negligent absence which was the cause of the "damage." The obligation was expressed in very guarded language and it is based entirely on this, that the burden is on the bailee to explain everything if and when it is proved that he has been guilty of some definite negligence which might account for the accident. It is not for the plaintiff in such a case to prove that it did. It is for the defendant to prove that it did not. In *The Stranna* (1) Langton J. applied the same principle.

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(1) [1915] 1 K. B. 73.

(2) Ibid. 97.

[His Lordship then discussed the evidence and the different hypotheses as to the cause of the explosion, and continued :]

The arbitrator found that "the explosion was one of an "unprecedented character and no sequence of events"—which includes no sequence of events through negligence—"which "was other than improbable was suggested as capable of "having given rise to it." It seems to me that in the result you have this position. Various suggestions have been made and various theories have been advanced. None of them is other than improbable. The worst I can say against the shipowners is that on one of these improbable suggestions it is possible that their negligence was the cause.

Willes J. in *Daniel* v. *Metropolitan Ry. Co.* (2) said: "It "is necessary for the plaintiff to establish by evidence "circumstances from which it may fairly be inferred that "there is reasonable probability that the accident resulted "from the want of some precaution which the defendants "might and ought to have resorted to." Blackburn J. in the Exchequer Chamber said (3): "We entirely agree with "the law laid down by the Court below." But possibility is not enough.

If it is right to apply the principles which I have been laying down, the case against the shipowners fails. It is plain that it has not been established that they were guilty of negligence and there is no finding of any negligence. The worst finding against them is under the one heading of possibility of negligence. Can it really be described as a case of "self-induced frustration"? The value of the principle of frustration would be almost destroyed if the mere possibility of relevant default could deprive the person seeking to take advantage of it of that right.

But, supposing that I am wrong in my view of where the burden rests, in what words must the burden on the owner be expressed in the implied condition? Is it really to be a burden which is not discharged by a finding that there was no evidence of default and that no default which was other than improbable could be suggested as a possible explanation of the accident ? Is the burden to be still heavier than that ? Is it to be a burden which is discharged only by proof that no default could possibly have contributed to the accident on any theory, however improbable ? I cannot bring myself to think that. I am not going to frame the term which is to be deemed to be implied, but, even if there is some burden on the shipowner other than that imposed by the ordinary principles of the law of negligence, I cannot think that the term to be implied must be so extreme as to prevent him from availing himself of the principle of frustration in a case like this. After all, the basis of an implied term is that it is supposed to be of such a character that, if it had been mentioned at the time of the making of the contract, both parties would have said : " Yes, we both mean that. Put it in." Can I possibly say that the shipowners here would readily and as a matter of course have assented to the incorporation of a term which deprived them of the right of relying on the doctrine of frustration unless they could prove in any circumstances that by no possibility could any negligence of theirs have accounted for the accident on any theory however improbable ?

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(1) [1937] P. 130.

(2) (1868) L. R. 3 C. P. 216, 222.

(3) Ibid. 593.

In my opinion, on any view the proper answer to the main question raised is that the burden has not been discharged by the charterers and that the claim ought to fail.

There are two other points raised with which I must deal. The shipowners say that, if they are wrong about the main matter, nevertheless they are entitled to rely on the exception of " accidents of navigation." I do not think that the clause applies before the contract voyage begins. Even if it does, I think that *The Southgate* (1) and *C. Wilh. Svenssons Travaruaktiebolag* v. *Cliffe Steamship Co.* (2) make it clear that this would not be " an accident of navigation."

As to the other plea concerning the incorporation of the Carriage of Goods by Sea Act, 1924, Sch., art. IV. (2.) (*a*), even if those articles apply before the contract voyage has

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(1) [1893] P. 329, 336.

(2) [1932] 1 K. B. 490.

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Atkinson J.

begun, they refer only to damage to goods. If I read them into this charterparty, it does not seem to me that I am entitled to change their meaning, and I think the principle of *Hamilton & Co.* v. *Mackie & Sons* (1) would apply. Even if I read them in, I must give them the same meaning as they have where they are in the Act, and if that be so they do not afford any assistance to the owners.

In the result I find in favour of the shipowners and I think that the charterers are not entitled to recover damages.

Order accordingly.

Solicitors for shipowners: *Holman, Fenwick & Willan.*
Solicitors for charterers: *Parker, Garrett & Co.*

W. L. L. B.

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(1) (1889) 5 Times L. R. 677.

BOARLAND *v.* PIRIE, APPLETON AND COMPANY, LIMITED.

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Jan. 22, 23.

STEMCO, LIMITED *v.* HYETT (INSPECTOR OF TAXES).

Revenue—Income tax—Mills and factories—Deduction to owners in respect of depreciation—Tenants to be treated as owners if " whole " of the burden of any depreciation falls upon " them—Tenants under strict covenants to repair—" Whole of the burden "—Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *s.* 15, *sub-ss.* 1, 5.

By s. 15, sub-s. 1, of the Finance Act, 1937, an owner of a mill or factory, in computing profits and gains under Sch. D to the Income Tax Acts, is entitled to a deduction in respect of depreciation of the premises. By sub-s. 5 the tenant of the premises is to be treated as the owner for this purpose if, under his covenants to repair, the " whole of the burden of any " depreciation of the premises falls upon him."

The tenants entered into strict covenants to repair in common form, but did not covenant to be liable for such depreciation as would arise, e.g., from decay and lapse of time :—

Held, that the above covenants would not include the whole burden of depreciation ; that the words of sub-s. 5 must be given their ordinary meaning, and that as the tenants, on that interpretation, were not liable for the " whole of the burden of any " depreciation " within the meaning of the sub-section, they were not entitled to be treated as owners.

CASES stated by Special Commissioners of Income Tax.

By a Scottish lease (the premises being situated in Aberdeen) dated January 1, 1919, Pirie, Appleton & Co., Ld. ("the company"), took on lease for a term of twenty-one years certain premises known as the Union Works, which were used by the company as a factory for their business. The lease contained (inter alia) the following provisions: "(1.) The "second parties [the company] shall further be bound and hereby "bind themselves and their foresaids to maintain the whole "subjects in good condition and repair during the period of this "lease and for that purpose timeously [duly] execute and carry "out all repairs of every kind required to keep the premises "in such good condition and repair. They shall not be liable "for damage arising to the buildings through actual subsidence "or general failure of structure, but otherwise the whole

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"responsibility for maintenance shall fall upon them, and "they shall be bound to hand back the premises to the first "parties [the lessors] at the termination of the lease in as "good condition as they received them. (2.) The second "parties shall at the termination of the lease be entitled to "remove the whole plant and machinery belonging to them, "whether of the nature of moveables or fixtures, and they "shall not be liable for any damage thereby necessarily caused "to the building."

The Union Works were about forty years old. The whole of the plant and machinery belonged to the company. The company had from time to time effected repairs to the works and fixtures, and the cost of such repairs had been allowed as deductions in the computation of the company's liability to income tax under Sch. D., Case I., of the Income Tax Act, 1918.

By a lease, dated September 12, 1932, Stemco, Ld., a company carrying on the business of manufacturing chemists, took on lease for a term of twenty years certain premises known as the Albert Street Works, which they used as a factory for their business. The company covenanted at all times during the term to repair and maintain the demised premises and all additions and improvements. They further covenanted to yield up the premises at the determination of the tenancy in good and substantial repair and condition. The lessors covenanted to keep the heating apparatus and boilers in good order and condition. The company had from time to time executed repairs to the works, and the cost of such repairs had been allowed as deductions in the computation of the company's liability to income tax under Sch. D, Case I. The company had in fact done any repairs necessary to the heating apparatus and radiators. No repairs to the boilers had been necessary. It was stated in evidence that the obligation of the lessors to keep the heating apparatus and boilers in good order and condition must have been overlooked. It was agreed that the Albert Street Works were mills, factories or other similar premises within the meaning of the Finance Act, 1937, s. 15, sub-s. 1.

The question for determination, in the case of each company, was whether the company should be treated, for the purposes of the Finance Act, 1937, s. 15, sub-s. 5 (1), as if it were the owner of the premises and allowed a deduction in respect of depreciation as such.

In the case of Pirie, Appleton & Co., Ld., the Commissioners were of opinion that under the terms of the lease the whole burden of maintaining the premises fell on the company, and that it was entitled to the deduction conferred by the Finance Act, 1937, s. 15, sub-ss. 1, 5, and they, accordingly, discharged the assessment.

In the case of Stemco, Ld., however, the Commissioners held that, having regard to the covenant by the lessors to keep the heating apparatus and boilers in good order and condition, the whole burden of any depreciation of the premises did not fall upon the company, and they, therefore, held that the appeal failed, and adjusted the assessment to figures which were agreed between the parties.

Sir Terence O'Connor S.-G. and *R. P. Hills* for the Crown. With regard to the case of Pirie, Appleton & Co., Ld., to succeed the respondents, the company, must establish that under their covenants of repair the whole of the burden of any depreciation of the premises falls upon them, within the meaning of s. 15, sub-s. 5, of the Finance Act, 1937. Under the covenants in the lease the whole of the burden of depreciation does not fall

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(1) By the Finance Act, 1937, s. 15, sub-s. 1: "In computing for "any year of assessment the amount "of profits or gains arising or "accruing from any trade the "profits of which are chargeable "to tax under Schedule D, Case I., "there shall be allowed a deduction of an amount hereafter "provided in respect of the depreciation of any premises being "mills, factories or other similar "premises, wherever situate, "which, during the period of "computation, are owned by the "person carrying on the trade and "occupied by him for the purposes "thereof."

Sub-s. 5: "A person occupying any premises as the tenant "thereof shall be treated for the "purposes of this section as if he "were the owner thereof if, under "the covenants to repair contained "in the lease or agreement by "virtue of which he occupies the "premises, the whole of the "burden of any depreciation of "the premises falls upon him."

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on the respondents, e.g., that arising from age, decay, or inherent defect: *Lister* v. *Lane and Nesham.* (1) The burden of depreciation as distinct from repairs rests on the lessors. The test whether the covenant to repair includes the whole of the depreciation is to ask if that could have been in the contemplation of the parties when they made the lease: per Cozens-Hardy M.R. in *Lurcott* v. *Wakeley and Wheeler* (2) in which *Lister* v. *Lane and Nesham* (1) was distinguished. [*Anstruther-Gough-Calthorpe* v. *McOscar* (3) was also referred to.] The respondents must show that they are liable for the loss arising from the ownership of a wasting asset. It would be quite possible to draft a covenant under which a tenant would be so liable, e.g., to replace an old building by a new one, though it would be unusual. If the owner was carrying on the business he could claim a deduction for depreciation, but the tenants in this case cannot do so.

F. N. Bucher for Pirie, Appleton & Co. The scope of s. 15, sub-s. 5, of the Act of 1937, must extend so as to make it refer to the burden on the tenant under strict repairing covenants, for otherwise no tenant of a mill or factory would ever be able to get the benefit of the sub-section. None of the usual covenants in leases of mills and factories ever go so far as to cast the whole burden of depreciation on the tenant. The section is intended to give relief to tenants whose premises are subject to excessive vibration and wear and tear, as appears by sub-ss. 2 and 3. The whole of the burden of depreciation under the covenants to repair means such burden as usual covenants to repair involve. For instance, it would not include latent defects, to which the words in the lease "general failure of structure" allude. In the Income Tax Act, 1918, "repairs" has a narrow meaning and does not include replacement: see Sch. A, No. V., r. 8, sub-r. 2. Similarly, in the Finance Act, 1937, s. 15, depreciation bears the same construction as it would have in a strict covenant to repair. [*Torrens* v. *Walker* (4) was also referred to.]

(1) [1893] 2 Q. B. 212.

(2) [1911] 1 K. B. 905, 913.

(3) [1924] 1 K. B. 716, 731.

(4) [1906] 2 Ch. 166.

H. B. Vaisey K.C. and *Scrimgeour* for Stemco, Ld. The repairing covenants in this case are very strict and, so far as covenants can, throw the whole burden of repair on the lessees. If the whole burden of repair falls on the lessees the whole burden of depreciation falls on them also. [Woodfall's Landlord and Tenant, 24th ed., p. 695, and *Anstruther-Gough-Calthorpe* v. *McOscar* (1) were referred to.]

Sir Terence O'Connor S.-G. replied.

WROTTESLEY J. There is one question which is common to both these appeals. That is whether or not the tenant of a factory under a lease containing what I may call strict covenants by the tenant to repair and maintain the demised premises is a person on whom, under those covenants, the whole of the burden of any depreciation of that factory falls. If he is such a person, then, in computing the amount of his profits or gains from the trade or business which he carries on in the factory, he is to be treated as if he owned the factory, and, accordingly, a deduction is to be made from his profits or gains in respect of depreciation of the factory.

It is agreed that, if the phrase in s. 15, sub-s. 5, "the "whole of the burden of any depreciation of the premises" is used in its ordinary literal and commonsense meaning, then a tenant, however wide or strict the covenants to repair in his lease may be, does not bear such a burden. However faithfully he may comply with his strict repairing covenants, there is going on all the time a continuing wearing out of the fabric of the premises for which he is not made liable during, or on the determination of, the lease. This wearing out effects a fall in value which is what is commonly meant by "depreciation."

The taxpayers in these two cases say: "There never was "a lease and there never were covenants to repair which "imposed on the tenant the whole burden of depreciation, "literally speaking. If, therefore, this sub-section is to "perform any useful function, the meaning of the phrase must "be cut down from its plain and usual meaning. In the first

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(1) [1924] 1 K. B. 716.

"place, it is to be cut down to cases where this burden is cast "upon a tenant by the covenants in the lease, for that is so "said in the sub-section itself." Here again the taxpayers say that, in the literal sense, there are no such cases. All that can be meant is the burden which is cast on a tenant by strict repairing covenants such as are to be found in both these cases.

I think that the answer to that part of the argument is two-fold. First, the limiting words "under the covenants "to repair" in sub-s. 5 are necessary because the depreciation being dealt with is that due to wear and tear as contrasted, for instance, with that due to change of fashion, or to obsolescence of design.

Secondly, it is a legal condition precedent to earning the relief provided by the sub-section that the burden should be cast on the person asking for the relief by a covenant to the lessor. The language is not of the happiest, I agree, and that is where the difficulty in this case comes in, for no covenant to repair, as lawyers in this country—perhaps more so in Scotland—understand the words, ever can strictly put on a tenant the whole burden of depreciation. Even if that be so, however, I do not see how I can interpret the phrase "the "whole of the burden of any depreciation" as not bearing its ordinary meaning just because the usual form of lease does not entitle the lessee to relief. In any event, by getting out of one alleged absurdity, I am afraid I should only get into another, and, by deciding in favour of the taxpayers here, I should bring it about that a tenant, who, unlike an owner, does not himself ultimately bear the loss due to depreciation, should, nevertheless, be given a measure of relief as though he did bear that burden.

In a skilful and ingenious argument, counsel for the respondent companies suggested that that could be justified in two ways, and so arrived at the second limitation on the otherwise plain words "the whole of the burden of any "depreciation of the premises." If one looks at sub-s. 2 and sub-s. 3 of s. 15, and particularly the latter, containing, as they do, the prescription for measuring the relief, it is, it is argued, clear that the Act is aiming at giving relief to those who occupy premises subject to excessive vibration and so to excessive wear and tear. I think that those sub-sections do indicate that, but here again I fail to see why a tenant whose factory is more costly to maintain and repair because of an unusual degree of vibration should be allowed to deduct from his pocket, not merely those extra costs, but also the resulting fall in value of the factory. It is common ground that the extra cost of maintenance and repair in such circumstances is a deduction which the tenant can make without recourse to this section. The resulting fall in the value of the factory is a loss which will fall, not on the tenant, but on the owner when the lease expires or is terminated. The only sense in which that loss can fall on the tenant is that he will be occupying premises which are perhaps becoming every year a little less suitable for the purpose for which he is using them. That appears to me to afford a good reason for his getting a reduction of rent, but I do not see that it is a good reason for his getting a reduction in the tax which he has to pay.

Then there is put forward the argument that, strictly construed, s. 15, sub-s. 5, is empty of content, because there is no case to which it applies to-day. I think that the answer is that those who want the benefit of that section must first of all accept the burden borne by the owner-occupier in the like case, namely, (i.) the burden of maintaining and repairing from time to time, and (ii.) over and beyond that, the burden of carrying the loss due to the ownership of what is a wasting asset. I do not commit myself to the Solicitor-General's formula, but I have no doubt that by appropriate words in a lease a tenant could shoulder this burden and that that could be put in that part of the lease which is properly described as a covenant to repair.

Passing to the particular cases argued, I deal first with the appeal of Pirie, Appleton & Co., Ld. I think that, under Scots law, the exception in the lease with regard to subsidence is no more than automatic. I think that that exception is one which is made automatically by the court to what we in

England would call a strict covenant. That seems to be common ground. I am not sure, however, that the other exception, namely, general failure of structure, is one which is thus automatically made by the courts. The phrase "general failure of structure," unless it is a term of art with a special meaning, seems to cover two quite different cases, one being a hidden defect and the other being precisely that decay which takes place in an old fabric. If "general failure "of structure" meant hidden defect only, I should be inclined to agree that the statement of that exception adds nothing to the lease, for it would be a case which would already be excluded by the courts from the liability imposed on a tenant by strict covenants to repair. I think, however, that "general "failure of structure" is appropriate to that which takes place by a process of age, and, therefore, one has here language particularly apt to describe the effect of depreciation. Thus, in my view, even if I were wrong in principle, that language, excluding from the tenant the burden arising from general failure of the structure, makes it plain that the tenant is not bearing the whole burden of any depreciation.

As regards the appeal of Stemco, Ld., I do not find any real difficulty in construing the lease. The effect of it is that, whereas the premises, generally speaking, are the subject of a strict repairing covenant, the heating apparatus and boilers are excluded therefrom, the burden of keeping those in good order and condition being cast on the landlord. Insignificant though that is, in a sense it again affords an illustration of a case where the whole of the burden of depreciation does not fall on the tenant. I do not think that it can be said, and I do not think that counsel for the appellant company would like me to hold, that the heating apparatus and boiler are not let. It must be said that they are let, although let as an appurtenance. Therefore, though rather a trivial exception, it seems to me that here again, in the rather strong language of the section, "the whole of the burden of any depreciation" does not fall on the lessees. For that special reason, quite apart from the decision in principle, I think that the Inland Revenue Commissioners were right in their decision.

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In the result, I find that the Crown succeeds in both these cases.

Orders accordingly.

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for Pirie, Appleton & Co., Ld.: *Richards, Butler & Co.*

Solicitors for Stemco, Ld.: *Piesse & Sons.*

W. L. L. B.

1940
Jan. 26;
Feb. 6.

D'AMBRUMENIL *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Income tax—Disposition for more than six years—Covenant to pay specific sum in first year and three-quarters of actual income in subsequent years—Direction to trustees to lend to covenantor with or without interest—No constant element in annual payments—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 27, *sub-s.* 1 (*b*)—*Finance Act,* 1922 (12 & 13 *Geo.* 5, *c.* 17), *s.* 20, *sub-s.* 1 (*a*), (*b*).

The appellant entered into a deed of covenant dated February 4 1937, to pay to the trustees thereof 20,000*l.* for the year commencing February 1, 1936, and to pay to the trustees in each subsequent year until that commencing February 1, 1945, a sum equal to three-quarters of his actual income in each year. The trustees were to hold these sums on trust to accumulate by way of investment and to pay to one P. such portion of the income as the appellant should direct. The trustees were also directed to advance to the appellant by way of loan with or without interest such sums as he might request. The sum of 20,000*l.* having been paid to the trustees for the first year, and 20,255*l.* 4*s.* 5*d.* for the second year, less tax, the appellant contended that those sums should be allowed as a deduction in computing his rated income for sur-tax for the years in question:—

Held, that the payments made to the trustees were not permissible deductions, since, as to both payments, they were not effective payments whereby the appellant's income was diminished within the meaning of the Income Tax Act, 1918, s. 27, sub-s. 1 (*b*); and, further, as to the payment of 20,000*l.* the appellant was able, without the consent of another, to obtain the beneficial enjoyment of this income within the Finance Act, 1922, s. 20, sub-s. 1 (*a*), and, as the direction to pay the 20,000*l.* in the first year had no bearing on the amounts to be paid in subsequent years, this payment was for a period which could not exceed six years within the Finance Act, 1922, s. 20, sub-s. 1 (*b*).

That payments made under covenant should be permissible deductions it must appear (1.) that the income is payable for a period of over six years, and (2.) that there is a constant element in the annual payments.

Quaere, whether a covenant by a person to pay the same fraction of his income for the requisite period would give rise to a permissible deduction for purposes of sur-tax.

CASE stated by Special Commissioners for Income Tax.

This appeal raised the question whether the appellant was entitled to deduct, in computing his total income for the purposes of sur-tax, the sum of 20,000*l.* for the year ending April 5, 1937, and the sum of 20,255*l.* 4*s.* 5*d.* for the year ending April 5, 1938, by reason of the matters hereinafter set out.

The case stated (so far as material) was as follows :—

By clause 1 of a deed of covenant made February 4, 1937, which recited that the appellant was anxious to make provision for Beatrice Philp, the appellant covenanted with trustees to pay them the following annual sums : (1.) In respect of the year from February 1, 1936, to January 31, 1937, the sum of 20,000*l.*, such payment to be made on March 31, 1937; and (2.) in each subsequent year until the year commencing February 1, 1945, a sum equal to three-quarters of the actual income received by the appellant in each year from all sources of income, such payment to be made in arrear on the following March 31.

Under clause 2 the trustees were to hold the sums in question on trust to accumulate the same by way of investment, paying to Beatrice Philp " such portion of the income arising "therefrom as the appellant during his lifetime shall direct" and accumulating the balance by investment.

Under clause 3 any sums in the hands of the trustees falling due for investment might, during the lifetime of the appellant, be invested as the appellant might direct, provided always that the trustees should, on the request of the appellant, advance from time to time any sums of money out of the funds in their hands (the trustees being authorized to sell investments for that purpose) by way of loan for such period at such rate of interest or without interest and on such terms as the appellant might request. Sums so advanced and the interest (if any) thereon might or might not be secured by the bond of the appellant and might remain on loan so long as the appellant might think fit, the trustees not being liable for any loss of any moneys so advanced or the interest thereon.

Evidence at the hearing, which was accepted, was given by one of the trustees under the deed, as follows : Beatrice Philp was of age and was no relation to the appellant. For many years she had lived in the appellant's house. The payment of 20,000*l.* due under clause 1 of the deed was made to the trustees on March 3, 1937. That payment was effected by the appellant handing to the trustees bearer bonds to the value of 19,910*l.* 12*s.* 6*d.* and a cheque for 89*l.* 7*s.* 6*d.* The first further payment due under clause 1 was made to the trustees on April 4, 1938. On this date, as income tax had not been deducted when the bonds were handed over on March 3, 1937, the appellant paid a cheque value 10,441*l.* 8*s.* 4*d.* to the trustees, being the amount of 20,255*l.* 4*s.* 5*d.* due for the year to March 31, 1938, less a deduction for income tax for the two years. The total net amount received by the trustees was 30,441*l.* 8*s.* 4*d.* for the two years. The appellant had an account at the Piccadilly Branch of Barclays Bank, Ld. On March 3, 1937, the above mentioned bearer bonds to the value of 19,910*l.* 12*s.* 6*d.*, which were held by this branch of the bank on his account, were transferred to an account at the same branch standing in the names of the trustees of the deed and the cheque for 89*l.* 7*s.* 6*d.* was paid into that account. On April 4, 1938, when the cheque for 10,441*l.* 8*s.* 4*d.* had been paid to the trustees, they lent to the appellant the sum of 10,500*l.* under the terms of the said deed. The appellant's request for this loan was made verbally to the trustees. The appellant had never made a direction under clause 2 of the deed and no payment under the deed had ever been made to Beatrice Philp.

It was contended on behalf of the appellant that the two sums of 20,000*l.* and 20,255*l.* 4*s.* 5*d.* should be allowed as a deduction in computing his total income for the purposes of assessment to sur-tax for the two years in question.

On behalf of the respondents it was contended—(*a*) That by reason of the provisions of the Finance Act, 1922, s. 20, sub-s. 1 (*a*), those sums of 20,000*l.* and 20,255*l.* 4*s.* 5*d.* were to be deemed to be the income of the appellant; (*b*) that in any case, by reason of the provisions of the Finance Act, 1922, s. 20, sub-s. 1 (*b*), the sum of 20,000*l.* was to be deemed to be the income of the appellant; (*c*) that there had been no effective payment and no effective charge on the appellant's income in either year; (*d*) that the whole transaction was a sham; (*e*) that the sums of 20,000*l.* and 20,255*l.* 4*s.* 5*d.* were not admissible deductions in computing the liability of the appellant to sur-tax for the years ended April 5, 1937, and April 5, 1938; and (*f*) that the appellant had not proved his claim for the deductions and that the appeal should be dismissed.

The Commissioners held that, in view of the provisions of s. 20, sub-s. 1 (*a*) and (*b*), of the Finance Act, 1922, the appellant was not entitled to deduct either of the sums of 20,000*l.* or 20,255*l.* 4*s.* 5*d.* in computing his total income for the purposes of assessment to sur-tax for the years in question. They were of opinion that the payment of 20,000*l.* on March 3, 1937, made under clause 1 of the deed bore no relation to the payment made on April 4, 1938, of the sum of 10,441*l.* 8*s.* 4*d.* They held that the appeal failed for both years and adjusted the assessments in accordance with this decision.

Raymond Needham K.C. and *J. S. Scrimgeour* for the appellant.

Sir Donald Somervell A.-G. and *R. P. Hills* for the respondents.

The arguments sufficiently appear from the judgment of Wrottesley J.

Cur. adv. vult.

1940. Feb. 6. WROTTESLEY J. In 1922 Parliament imposed certain limitations on the dispositions which should rank as diminutions of a person's income for the purposes of sur-tax. By s. 20, sub-s. 1 (*a*) and (*b*), of the Finance Act, 1922, it was enacted that, if a disposition should be revocable or not really effective, or should be for a period not exceeding six years, it should be insufficient, and the income should be deemed, in spite of the disposition, to be income of the maker of the disposition for the purposes of sur-tax.

The effectiveness of a disposition must be judged by the words of this section. The disposition which I have to consider has certain elements in it which, as the Attorney-General contends for the Crown, cause it to fall within both paragraphs (*a*) and (*b*) of s. 20, sub-s. 1, which are as follows: "Any income (*a*) of which any person is able, or has, at any "time since April 5, 1922, been able, without the consent of "any other person by means of the exercise of any power "of appointment, power of revocation or otherwise howsoever "by virtue or in consequence of a disposition made directly "or indirectly by himself, to obtain for himself the beneficial "enjoyment; or (*b*) which by virtue or in consequence of "any disposition made, directly or indirectly, by any person "after May 1, 1922 (other than a disposition made for "valuable and sufficient consideration), is payable to or applicable for the benefit of any other person for a period which "cannot exceed six years," is to be deemed for the purposes of the enactments relating to sur-tax to be the income of the taxpayer.

[His Lordship stated the facts, and continued:] The first question which I have to decide is whether these sums of money, namely, the 20,000*l.* paid on March 3, 1937, and the 10,441*l.* 8*s.* 4*d.* paid on April 4, 1938, together with the income tax thereon—in all 40,255*l.* 4*s.* 5*d.*—were income of which the appellant has since April 5, 1922, been able, without the consent of any other person, by virtue of or in consequence of a disposition, to obtain for himself the beneficial enjoyment.

Before the execution of the deed these sums were part of the income of the appellant. The question then arises whether the appellant was able by this disposition " to obtain "for himself the beneficial enjoyment " of this amount of income. If, by these words, the Act means beneficial enjoyment of this income qua income, the answer is in the negative, for the whole design of the deed is that this income shall go, at least in name, into a trust fund. Not less is it the design of the deed that it should not remain there for a second longer than the giver wishes. The giver can at once borrow every farthing of it, possibly for ever, if in such a connection the word " loan " has any meaning, but certainly for one thousand years, without interest, or security. Moreover, should the giver lose the whole of the money after borrowing it, the trustees are in no event to be liable. Beatrice Philp, the person for whose benefit the trust is apparently created, has no remedy against them (the trustees) or the giver.

If I have the right to borrow, that is to say, to be paid the whole of a man's income as fast as he receives it, against his will, on terms that I need neither repay it in any period which interests either of us or our descendants to the twentieth generation, nor pay him interest on it, nor give him security, which of us can be said to have the beneficial enjoyment of this income, if I exercise those rights? It seems to me that in such a case the income benefits the borrower, and not the lender. The borrower enjoys. The lender may suffer. He certainly cannot be said to enjoy.

Bearing in mind the object of this legislation, I have no doubt that in the case before me the appellant was able, if he chose, to obtain for himself the beneficial enjoyment of all this money. He was able so to dispose of matters that that income should benefit him, and that he should enjoy it rather than Beatrice Philp.

The Finance Act, 1922, s. 20, sub-s. 1 (*a*), was repealed by the Finance Act, 1938, s. 55, and Fifth Schedule, so that what has been said above applies only to the sum of 20,000*l*. paid on March 3, 1937, and not to the sum paid on April 4, 1938. But there still remains for consideration the question whether either of these payments, having regard to the terms of the trust which govern the trustees after payment, can be said to be an effective payment by the appellant, that is to say, an annual payment whereby the appellant's income was or might be diminished under s. 27, sub-s. 1 (*b*), of the Income Tax Act, 1918.

There is no evidence of a direction by the settlor, and without such a direction, which need never be given, Beatrice Philp will never get the income of this so-called trust, nor will the substituted beneficiary provided for in clause 5 of the deed. Furthermore, if the settlor exercises his right to ask for advances out of property which was his own until it reached the trustees, he has only to ask to have his wish gratified, and by that means he controls not only the income but also the capital of the trust. Can a payment to trustees made in these circumstances and for such purposes be said to be an effective payment whereby the appellant's income is, or may be, diminished, or can it be said to be a charge on his income? It seems to me that such payment is not really effective until the appellant is dead, and s. 27, sub-s. 1 (*b*), of the Act of 1918 does not contemplate a payment which only becomes effective if and when the settlor dies without taking the money back. There is no evidence on which the Commissioners could find that there was an effective payment. The payments to the trust fund, found by the Commissioners as facts, are not and do not purport to be such payments.

The second question which arises concerns only the payment of the 20,000*l*. Was this income which by virtue of the deed is payable to or applicable for the benefit of any other person for a period which cannot exceed six years? What is meant by "income payable for a period" in this connection? It is argued for the appellant that the amount is of no importance, and that provided some income is payable in respect of each year for more than six years, this sub-section does not apply —that if there were the promise of a substantial payment in one year and six nominal ones in subsequent years, the case would be outside this sub-section. Bearing in mind the object of this sub-section, it appears to me that the whole object with which a period of years was introduced by Parliament would be entirely set at nought by such an interpretation, and this apart from the fact that this case is covered by authority. To be a permissible deduction, the income must be payable for a period of over six years and I think that there must be some constant element in such yearly payments of income. It may be that the constant element introduced by the promise of the same fraction of a man's income for the requisite number of years would be sufficient. In this case the 20,000*l*. has nothing in common with the subsequent payments, all of which are to be a constant fraction of the giver's yearly income. It is a sum payable for one year, and therefore, in the words of the statute, "for a period "which cannot exceed six years." In coming to this conclusion it appears to me that I am in effect following the decision of Lawrence J. in *Inland Revenue Commissioners* v. *Mallaby-Deeley*. (1)

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(1) (1938) 55 Times L. R. 293.

That being the conclusion to which I have come, the appeal will be dismissed.

Appeal dismissed.

Solicitors for appellant: *Lovell, White & King.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

F. P. F.

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Jan. 26, 29, 30, 31.

RIPPON *v.* PORT OF LONDON AUTHORITY AND J. RUSSELL AND COMPANY.

Factory and Workshop Acts—Factory—Public dry dock—Defect in steps giving access to dock—Accident to workman of ship-repairers —" Occupier " of " factory "—Notional occupier—Contribution between joint tortfeasors—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 25, *sub-s.* 1 ; *s.* 26, *sub-s.* 1 ; *s.* 130, *sub-s.* 1 ; *s.* 151—*Shipbuilding Regulations,* 1931 (*St. R. & O.,* 1931, *No.* 133), *Part I., para.* 1—*Law Reform* (*Married Women and Tortfeasors*) *Act,* 1935 (25 *&* 26 *Geo.* 5, *c.* 30), *s.* 6, *sub-s.* 2.

By s. 25, sub-s. 1, of the Factories Act, 1937, it is provided that " all floors, steps, stairs, passages and gangways " of a factory " shall be of sound construction and properly main-"tained," and by s. 26, sub-s. 1 : " There shall, so far as is "reasonably practicable, be provided and maintained safe means "of access to every place at which any person has at any time "to work."

Sect. 130 provides that " In the event of any contravention "in or in connection with or in relation to a factory of the pro-"visions of this Act, or of any regulation or order made there-"under, the occupier . . . . of the factory shall, subject as "hereinafter provided, be guilty of an offence."

By s. 151 : " Any yard or dry dock . . . . in which ships or "vessels are constructed, reconstructed, repaired, refitted or "broken up " is a factory for the purposes of the Act.

By the Shipbuilding Regulations, 1931, made under s. 79 of the Factory and Workshop Act, 1901, and preserved by the Act of 1937, it is declared under the heading of " Duties," that " It "shall be the duty of the occupier to comply with Parts I. to "VIII. of these Regulations. Provided that, when a ship is "being repaired in public dry dock, the person who contracts "with the owner of the ship or with his agent to execute the "work of repair shall be deemed to be the occupier for the purposes "of Parts I. to VIII., and it shall be his duty to comply with "the said parts." A " public dry dock " is defined as any dry "dock which is available for hire," and Part I., para. 1, requires that " safe means of access shall be provided to all parts of the "ship to which persons employed may be required to proceed "in the course of their employment."

The plaintiff, a foreman boiler-maker plater, employed by the second defendants, a firm of ship-repairers, sustained serious injury by falling into a public dry dock which the second defendants were hiring from the first defendants to repair a steamship. The plaintiff was proceeding to the dry dock in the course of his employment, and the accident was caused by the defective and crumbling state of one of a flight of steps which afforded means of access to the dock. The plaintiff claimed damages from both, or alternatively either, of the defendants. Each defendant contended (inter alia) that the other was the "occupier" of the dry dock within the meaning of the Act of 1937 and of the Shipbuilding Regulations, 1931:—

Held, that the second defendants, by their contract of hiring, retained possession and control of the dry dock, and were the occupiers for the purposes of the Act of 1937; that for the limited purposes of the Shipbuilding Regulations, 1931, the person who contracted to do the repairs to a vessel in a public dry dock was deemed to be the occupier of the dock, and, if the occupiers under the statute failed to comply with the duty laid upon them by s. 26, it then became the duty of the ship-repairer to provide safe means of access; and that as the injuries to the plaintiff had been caused by a breach both of s. 25, sub-s. 1, and s. 26, sub-s. 1, of the Factories Act, 1937, and of Part I., para. 1, of the Shipbuilding Regulations, 1931, he was entitled to recover damages against both defendants.

Liability apportioned between the two defendants under s. 6, sub-s. 2, of the Law Reform (Married Women and Tortfeasors) Act, 1935.

ACTION tried by Tucker J., without a jury.

The plaintiff, James Rippon, was a foreman boiler-maker plater employed by the second defendants, J. Russell & Co., a firm of ship-repairers, who at all material times had the use of a dry dock at Millwall to execute repairs to the steamship *Deido*. The dry dock was owned by the first defendants, the Port of London Authority, who for payment had granted the use of it to the second defendants. On or about November 5, 1938, the plaintiff, in the course of his employment, was proceeding on board the steamship by way of steps which gave access to the dock, when, by reason of one of the steps being in a defective condition, it crumbled and he fell into the dock and sustained serious injury. In an action by the plaintiff for damages for personal injuries it was pleaded (inter alia) that the dry dock was a "factory" within the meaning of the Factories Act, 1937; that at all material times it was in the occupation of the first defendants, or alternatively of the second defendants, or of both defendants; and that the plaintiff's injuries were caused by the breach of statutory duty and/or negligence of either or both defendants in failing to provide and maintain safe means of access to the ship and dock. Each of the defendants denied that they had been

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guilty of negligence or breach of statutory duty, and each contended that, if the Factories Act, 1937, and the Shipbuilding Regulations, 1931, applied, the dry dock was not in their occupation, within the meaning of that statute and those regulations, at the material time. In third-party proceedings Russell & Co. claimed against the Port of London Authority an indemnity for any damages and costs for which they might be held liable to the plaintiff.

H. V. Willink K.C. (*F. Wishart* with him) for the first defendants. The Port of London Authority was not the occupier under the Act of 1937, and it is only the occupier who is under a statutory duty to maintain safe means of access. There is no general definition of "occupier" in the Act of 1937, nor was there in the earlier Acts. "Use or occupation" are sufficient for the purpose of liability of the occupier: *Raine* v. *Jobson & Co.* (1) The occupier is the person who from time to time has control, and not the person who has legal possession in a technical sense: *Madrassa Anjuman Islamia* v. *Johannesburg Municipal Council.* (2) Sects. 17, 23 and 24 of the Act of 1937 show what a curious result will be produced if the dockowner, and not the ship-repairer, is held to be liable. All the obligations imposed by those and other sections apply to the person who has the general control and can take the necessary steps to prevent the workman from using the particular means of access, or machinery, as the case may be. After they had let the dock the Port of London Authority could not have forbidden the plaintiff's employers to use the steps. Sect. 26, sub-s. 1, does not mean that "all" means of access must be safe. Here there were some means of access to the ship and dock which were safe. Under the Shipbuilding Regulations, 1931, it is clear that the ship-repairers, as the persons who contract with the shipowner to do the work of repair, are to be deemed to be the occupiers. The Port of London Authority cannot be liable for any breach of para. 1, Part I. The claim of Russell & Co. to be indemnified by the Port of London Authority can only arise if such a term is to be implied in the contract between

(1) [1901] A. C. 404.

(2) [1922] 2 A. C. 500.

the two defendants in order to give business efficacy to it. It ought not to be implied here, because Russell & Co. had worked in this dock before and knew it well. [He also referred to *Smith* v. *Cammell Laird & Co., Ld.* (1)]

G. J. Paull K.C. (*S. R. Edgedale* with him) for the plaintiff. It is not important for the plaintiff to establish which defendant was the occupier of the dock, but only to establish a breach of duty by one or both. The argument by his counsel is therefore as amicus curiæ. Russell & Co., being the persons contracting with the shipowners to repair the ship, are, under the Regulations, the occupiers of the dock, who are bound to comply with Parts I. to VIII. of the Regulations. By para. 1 of Part I, "Safe means of access shall be provided to all parts of the ship." "Access" means access from the ordinary ground level and does not apply merely to the ship itself. As between the Port of London Authority and Russell & Co. the latter were invitees, and the duty of the former was to take reasonable care to see that the premises were safe: *Robert Addie & Sons* (*Collieries*), *Ld.* v. *Dumbrick.* (2) Even if Russell & Co. were only licensees the Port of London Authority would still be liable: *Ellis* v. *Fulham Borough Council.* (3) Reasonable inspection at reasonable intervals would have revealed the state of the steps to the Port of London Authority, who are therefore liable: *Cole* v. *de Trafford* (No. 2) (4); and *Webb* v. *Rennie.* (5)

Russell Vick K.C. (*Cyril Salmon* with him) for the defendants, Russell & Co. The occupiers were those who had the real control of the dock, namely the Port of London Authority. The intention of the parties must be looked to: *Rochdale Canal Co.* v. *Brewster.* (6) By the agreement the Port of London Authority retained the right to occupy spare space in the dock with other ships, and they made by-laws, for a breach of which the hirers of the dock could be fined. There cannot be a joint occupation, for in that case each party might be liable for the acts of the other. *Smith* v. *Cammell Laird & Co.* (1) and *Allan* v. *Liverpool Overseers* (7) show that the Port of

(1) [1940] A. C. 242.
(2) [1929] A. C. 358, 365.
(3) [1938] 1 K. B. 212, 220.
(4) [1918] 2 K. B. 523, 535.
(5) (1865) 4 F. & F. 608, 612.
(6) [1894] 2 Q. B. 852.
(7) (1874) L. R. 9 Q. B. 180.

London Authority were the occupiers, Russell & Co. having merely a licence to go on these steps. They were under no duty to inspect the steps, and would not have been allowed by the Port of London Authority to deal with them. "Safe means "of access" in Part I. of the Regulations refers to the ship itself and contemplates such things as stages and ladders, and has no application to steps which give access to the dock. At common law there was an implied warranty, as between Russell & Co. and the Port of London Authority, that the steps were reasonably safe, and even if Russell & Co. were negligent as between the plaintiff and themselves the Port of London Authority is not relieved from liability: *Mowbray* v. *Merryweather*. (1) [He also referred to *Indermaur* v. *Dames* (2); *Mersey Docks and Harbour Board* v. *Procter* (3); *Mersey Docks and Harbour Board* v. *Gibbs* (4); *Maclenan* v. *Segar* (5); and *Francis* v. *Cockrell*. (6)]

TUCKER J. [stated the facts, read s. 25, sub-s. 1, s. 26, sub-s. 1, and ss. 130, 133 and 151 of the Factories Act, 1937, and continued:] It appears that the occupier is the person responsible for the observance of these statutory duties, except in so far as the statute provides that the responsibility is to be on the owner. Sects. 25 and 26 are not sections in respect of which an obligation is laid on the owner. Accordingly, it is the duty of the occupier of the factory, in this case the dry dock, to see that those sections are complied with. I am satisfied that there was, in respect of the steps in question here, a breach of s. 25, sub-s. 1, in that the steps had not been properly maintained at the time of the accident. I also find that there has been a breach of the statutory duty imposed on the occupier by s. 26, sub-s. 1, and a breach of para. 1 of Part I. of the Shipbuilding Regulations, 1931.

It has been laid down in *Smith* v. *Cammell Laird & Co., Ld.* (7), what matters are proper to be taken into consideration in determining who is the occupier. It is to be observed that

(1) [1895] 2 Q. B. 640, 645.
(2) (1866) L. R. 1 C. P. 274, 288.
(3) [1923] A. C. 253, 260.
(4) (1866) L. R. 1 H. L. 93.
(5) [1917] 2 K. B. 325.
(6) (1870) L. R. 5 Q. B. 501, 508.
(7) [1940] A.C. 242, 258, 267.

in that case the Court was considering who was the occupier of a shipyard, not the occupier of a dry dock, but Lord Atkin uses these words: "It was said that to construe this clause "as imposing the absolute duty on the occupier in this case "leads to such an unreasonable result as to throw doubt upon "such a construction. My Lords, I cannot agree. The "occupiers of a shipbuilding yard, as are the respondents in "this case, have complete control over their yard, and can "impose their own conditions upon those who enter the yard, "and use either their own plant or that of the occupiers of the "yard. They can insist upon the plant being constantly "maintained in a safe condition, can terminate the licence "to enter the premises or use the plant in case of breach, and "can take any indemnities they think fit. In this particular "case, the respondents constructed the staging. It appears "that, for the use of their own men, they took the very precaution which was necessary to avoid the play of the planks "by lashing them to the bearers." Lord Wright says: "The "'occupier' on whom the duties under Parts I. to VIII. are "imposed is not defined, but it is, I think, clear that what "is meant is the occupier of the yard as a whole, who are, "in this case, the respondents. This is confirmed by the "specific exception of the person who contracts to repair "a vessel in a public dry dock. Such person is 'deemed' to "be the 'occupier,' as contrasted with the person having the "general management and control of the dock, and there are "express provisions that certain duties should rest on that "person, just as certain other duties are imposed also on "the shipowners. It is thus manifest that special provisions "are needed to shift the responsibility from the owner or letter "of the dock, who would be the occupier of the dock if it were "not a public dry dock. Apart from that provision, it is, "I think, clear that, though the Regulations do not define the "occupier any more than does the Act, they contemplate "one single occupier of the whole shipyard."

That case shows that I have to look at the substance of the matter. "Occupier" is not defined in the Act of 1937. The Port of London Authority grant the use of their dry dock for varying periods, no doubt, to numbers of shipowners and ship-repairers on certain terms and conditions contained in the form for the application for the use of a dry dock signed by Russell & Co. It appeared in evidence that if Russell & Co. had desired to execute repairs to these steps the Port of London Authority would not have allowed them to do so. I hold that the Port of London Authority were the occupiers of this dry dock for the purposes of the Factories Act, 1937. I think they granted to Russell & Co. the right to use the dock on the terms and conditions laid down in the application form, and subject to the payment of the rates and rent prescribed by the authority's regulations. I do not think it is conclusive that one finds that the word "occupation" is sometimes used in the clauses of the application form, nor do I think it is conclusive that the word "use" (of the dock) is sometimes used. Similarly, the fact that the word "rent" is used also affords no guidance. Nobody suggests that the relationship of landlord and tenant existed between these two defendants. I think that the true position is that Russell & Co. were granted permission, or licence, to use the dry dock for the purposes of repair on making certain payments, that the Port of London Authority retained possession and control over the dock throughout, and that they were at all times the occupiers.

It is said that so to hold may result in the Port of London Authority being held liable under the Factories Act, 1937, for breaches of duties which it would be unreasonable to suppose the Legislature intended to put on such a body. Take, for example, s. 14, which provides: "Every dangerous part of any "machinery other than prime movers and transmission "machinery shall be securely fenced unless it is in such a "position, or of such a construction, as to be as safe to every "person employed or working on the premises as it would be "if securely fenced." There are numerous other provisions applicable, no doubt, in the case of ship-repairing, to the work being carried out by ship-repairers, but to hold that Russell & Co. were the occupiers would equally lead to results which might appear to be unintended by the framers of this Act. The real answer, I think, is to be found in the passage in the speech of Lord Atkin which I have already read, in which it was said that the occupiers of a shipbuilding yard have the right to impose any terms and conditions they think proper on those who enter the yard, and can protect themselves in that way. However that may be, and whatever the results may be, in my view, looking at the whole of the circumstances of the case, I hold that the Port of London Authority, and not Russell & Co., were the occupiers of this dry dock for the purposes of ss. 25 and 26.

With regard to the Shipbuilding Regulations, 1931, as I have already stated, there is a provision that when a ship is being repaired in a public dry dock the person who contracts with the owner of a ship, or with his agent, to execute the work of repair, shall be deemed to be the occupier for the purpose of Parts I. to VIII. It is quite clear, therefore, that in this case the Port of London Authority are not the occupiers for the purpose of the regulations contained in Parts I. to VIII., which apply only when a ship is being repaired in a public dry dock. In the case of ship-repairing in a public dry dock there is what has been described in *Smith* v. *Cammell Laird & Co.* (1) as a "notional occupier for the limited purpose," and it is clear that in the present case Russell & Co. were the notional occupiers for the purpose of these regulations. It might appear curious if there are different occupiers for the purpose of the statute and for that of the Regulations, but I do not think that really is the case, because most of the regulations which apply to ship-repairers deal with matters which are primarily the concern of ship-repairers. It so happens that one regulation deals with a matter which might be thought to concern the persons who provide the dock. It deals with the same subject-matter as s. 26 of the Act. I think the effect of s. 26 and of the Regulations as regards the provision of safe means of access is that liability is by the Act put on the Port of London Authority, while under the Regulations it falls upon Russell & Co. If the Port of London Authority, as occupiers under the Act, have not complied with the duty laid on them by s. 26 then, and then only, it becomes the duty of the ship-repairers to provide safe

(1) [1940] A. C. 242.

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means of access. I do not think there is anything peculiar in that liability being put, in the first instance, on the Port of London Authority, and, secondarily, on the ship-repairers if they find that safe means of access have not in fact been provided by the persons who have granted them the use of the dock.

I therefore hold that the Port of London Authority have failed in their statutory duty under ss. 25 and 26, and that Russell & Co. have failed in the statutory duty put on them by Part I. of the Regulations. There is no dispute that the plaintiff is a person who is entitled to the benefit of those regulations in a civil action, and I do not propose to deal with the claim that has been based on negligence at common law. It is sufficient for me to hold that there have been breaches of these statutory duties. The plaintiff is entitled to recover against both defendants.

[His Lordship then rejected the claim of the second defendants in their third-party proceedings to an indemnity from the Port of London Authority, and continued :] By the Law Reform (Married Women and Tortfeasors) Act, 1935, it is now open to me, in a case such as this, if I am asked so to do by one or more of the defendants, to decide what contribution, if any, there shall be between the defendants, both of whom I have found to be liable to the plaintiff. The words of s. 6, sub-s. 2, of that Act are as follows : "In any proceedings "for contribution under this section the amount of the contri-"bution recoverable from any person shall be such as may be "found by the court to be just and equitable having regard "to the extent of that person's responsibility for the damage." Those words are very wide, and provide for the Court doing what is just and equitable having regard to the extent of the person's responsibility for the damage. It may appear to be curious to decide that the responsibility of one person, who has committed a breach of a statutory duty laid down by Act of Parliament, is in any way different from the responsibility of a person who has committed a very similar breach of statutory duty imposed by regulation made under or confirmed by the Act of Parliament, but in this case I have held that the

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Port of London Authority were the occupiers of the dock, in substance, and that Russell & Co. were merely notional occupiers under the Regulations for a limited purpose. Having regard to all the circumstances of the case, and bearing in mind that I am dealing with a stairway down the side of the dock and forming an integral part of the dock which was at all times within the complete control of the Port of London Authority, that they recognized it as their duty to inspect and repair that stairway from time to time, and that they would not allow Russell & Co. to carry out any repairs to the steps, I feel that the responsibility of the Port of London Authority is considerably greater than that of Russell & Co. I think it just and equitable that the proportion between the two should be three-quarters liability on the Port of London Authority, and a quarter on Russell & Co. The special damage has been agreed, and the sum at which I assess the damages is 3355*l.* 11*s.* 3*d.*, for which sum there will be judgment for the plaintiff against both defendants.

Judgment for plaintiff.

Solicitors for the plaintiff: *Shaen, Roscoe, Massey & Co.*
Solicitor for the Port of London Authority: *H. Le Mesurier.*
Solicitors for Russell & Co.: *Blount, Petre & Co.*

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POTTS *v.* POPE AND PEARSON, LIMITED.

Master and servant—Workmen's compensation—Infant employee injured by accident—Review of compensation after attaining twenty-one years —Subsequent application for review on ground of fluctuations in rates of wages—Previous review final—Class of employment— Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 11, *sub-s.* 2, 3.

A review of the rate of compensation of a workman who was injured by an accident arising out of and in the course of his employment while a boy, under s. 11, sub-s. 3, of the Workmen's Compensation Act, 1925, cannot be obtained on the ground that there has been a fluctuation in the rates of wages exceeding 20 per cent. since he obtained a review under s. 11, sub-s. 2, of the Act shortly after coming of age.

The reference in s. 11, sub-s. 3, to a preceding "review" refers only to a review under the sub-section itself or under the section that it replaced, that is s. 15 of the Workmen's Compensation Act, 1923.

A boy haulage hand belongs to a different class of employment from an adult haulage hand, and if on a review under s. 11, sub-s. 2, of the Act of 1925 he is taken to have passed into the class of adult haulage hands and his notional pre-accident wages have been fixed on that basis, no further review is possible.

APPEAL from an award of Judge Frankland sitting at Wakefield County Court as arbitrator under the Workmen's Compensation Acts.

The applicant Ernest Potts was in the employment of the defendants at their collieries at Normanton, as a boy haulier, when on July 16, 1924, he met with an accident by having his hand caught between full tubs. He was then fourteen and a half years of age and his average weekly earnings before the accident were 19*s.* 4*d.*, representing 5¼ shifts per week at 3*s.* 8*d.* a shift. He was paid the appropriate rate of compensation until he returned to light work on the screens in 1926, and for a further period of five years he was paid various amounts of compensation. In March, 1931, the applicant, having shortly before then attained twenty-one years of age, commenced proceedings for a review of his weekly compensation under s. 11, sub-s. 2, of the Workmen's Compensation Act, 1925. The applicant then claimed that if he had remained uninjured he would have been working on the coal face and that he was therefore entitled to compensation calculated on this basis. The county court judge before whom it came held that, had the applicant remained uninjured he would still have been a haulage hand and earning 1*l*. 9*s*. 2*d*. a week, being 3·86 shifts at 7*s*. 5½*d*. per shift and as his actual earnings were 17*s*. 7*d*. per week made an award to him of 8*s*. a week compensation.

The applicant's earnings on the screens increased to 1*l*. 4*s*. 4*d*. a week, and after due notice under the Act the weekly payment of compensation was reduced 3*s*. 4*d*. a week as from December 4, 1938. In these circumstances the applicant applied on July 25, 1939, for a review and increase of the weekly payments payable to him in respect of his personal injury from December 4, 1938. The grounds on which this was asked was that he was entitled to an increase in the rate of compensation under s. 11, sub-s. 3, of the Workmen's Compensation Act, 1925. (1)

The figures relating to the claim were stated by the county court judge in his statement of the agreed facts in his judgment: "The wages of adult haulage hands for "12 months before the last review were 7*s*. 5½*d*. per shift, and "for the 12 months before December, 1938, 10*s*. 2*d*. per shift;

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(1) The Workmen's Compensation Act, 1925, s. 11, sub-s. 3, provides: "Where the review "takes place more than six months "after the accident, and it is "claimed and proved that, had "the workman remained unin-"jured and continued in the same "class of employment as that in "which he was employed at the "date of the accident, his average "weekly earnings during the twelve "months immediately preceding "the review would, as a result of "fluctuations in rates of remun-"eration, have been greater or less "by more than twenty per cent. "than his average weekly earnings "during the twelve months pre-"vious to the accident (or if the "weekly payment has been pre-"viously varied on a review during "the twelve months previous "to that review or the last of "such reviews), the weekly pay-"ment shall be varied so as to "make it such as it would have "been if the rates of remuneration "obtaining during the twelve "months previous to the review "had obtained during the twelve "months previous to the accident.

"For the purposes of this "sub-section 'review' includes a "review under the provision of "any Act repealed by this Act "corresponding to this section."

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"an increase greater than 20 per cent. During 1924 and for "12 months before December, 1938, the wages of boy haulage "hands were respectively 3*s.* 8*d.* per shift and 4*s.* per shift; "an increase less than 20 per cent. . . . ." The claim is put thus: "The applicant worked 5¼ shifts per week before the "accident, and he claims that he would have been earning "per week 2*l.* 13*s.* 4*d.*, being 5¼ shifts at 10*s.* 2*d.* per shift. "His present earnings are 1*l.* 4*s.* 4*d.* per week showing a "difference of 1*l.* 9*s.*, and he claims half this amount, namely, "14*s.* 6*d.* per week, as compensation."

The county court judge said that clearly the applicant's claim involved the cumulative application of sub-ss. 2 and 3 of s. 11 of the Act, for in 1931 the applicant is given a notional pre-accident employment and wages on which he sought to graft a benefit based on a rate fluctuation of the notional employment. That was a misapplication of the Act. Apart from the words in parenthesis in s. 11, sub-s. 3, the meaning of its provisions was clear. The workman is considered as uninjured and working in the same class of employment as before the accident and as being paid the current rate of remuneration for the previous twelve months. The weekly average of this is contrasted with the weekly average actually earned before the accident. If the difference is greater than 20 per cent., the compensation may be varied. Unless then the parenthesis alters the position, this claim must fail for boy haulier's wages have fluctuated by less than 20 per cent. Turning to the words in parenthesis, he thought they referred to a previous review of the class created by the sub-section itself and therefore that the previous review in 1931 under sub-s. 2 must be ignored.

There was, however, a still more convincing reason for this. The early words of the sub-section were "had the workman "remained uninjured and continued in the same class of em- "ployment as that in which he was employed at the date of "the accident." It was argued for the applicant that "class" and "grade" had entirely different meanings in the Workmen's Compensation Acts and reference was made to s. 10. He said the point was covered by authority and that he could

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raise the point formally in the county court, whether that was so or not, as reference to s. 10 did not help the present case. The words were used in s. 10 in dealing with cases where the workman's rate of remuneration could not be computed and it had to be ascertained by reference to the earnings of a man from the same grade employed in the same class of employment. But in s. 11, sub-s. 3, it is the actual workman's pre-accident earnings that were dealt with and it is sufficient to indicate that no change of status is to be contemplated in contrast with sub-s. 2. He held that the class of employment in this case was that of boy haulage hand. The application therefore failed.

The applicant appealed. The appeal was heard on February 14 and 15, and judgment given on February 28, 1940.

R. W. Payne for the appellant. There is nothing in the language of s. 11, sub-s. 3, of the Workmen's Compensation Act, 1925, to prevent a workman who has already obtained a review under s. 11, sub-s. 2 (as amended by s. 1 of the Workmen's Compensation Act, 1926), within six months of his attaining the age of twenty-one years, from obtaining a further review under s. 11, sub-s. 3, if there has been a fluctuation in the rate of wages since then of over 20 per cent. The case where there has been a previous review is expressly referred to in the words in brackets in the sub-section substituting the rate of payment during the twelve months previous to the review for the rate of payment during the twelve months previous to the accident. It is true that in the original section corresponding to s. 11, sub-s. 3, of the 1925 Act, which was s. 15 of the Workmen's Compensation Act, 1923, "review" was given the limited meaning of a review under the section; but in s. 11, sub-s. 3, of the 1925 Act, it is provided that "for "the purposes of the sub-section 'review' includes a review "under the provision of any Act repealed by the Act corre-"sponding to this section." It is to be noted that the concluding words are "corresponding to this section" and not "corre-"sponding to this sub-section," and "review" therefore includes not only a review under s. 15 of the 1923 Act (now s. 11, sub-s. 3, of the 1925 Act), but also reviews under para. 16 to the First Schedule to the Workmen's Compensation Act, 1906 (now s. 11, sub-s. 1, of the 1925 Act), and reviews under the proviso to that para. 16, afterwards s. 24, sub-s. 6, of the Act of 1923, and now s. 11, sub-s. 2, of the Act of 1925.

[Slesser L.J. This argument involves the Consolidation Act of 1925, having effected an alteration in the law.]

It was really correcting a mistake in s. 15 of the Act of 1923 and putting back the law to a position corresponding to that before the passing of the 1923 Act: see para. 16 to Sch. I. to the Act of 1906, which by its proviso enabled a person injured while an infant to go on getting reviews indefinitely when there was a change of circumstances. The Act of 1923 substituted a limited right of review under s. 24, sub-s. 6, and the Act of 1925 restores the right unlimited in time.

Apart from the construction of s. 11, sub-s. 3, the county court judge held that the application for a review must in any case fail because there had not been a fluctuation in the rate of wages exceeding 20 per cent. That is only true if the class of employment of the workman always remained that of boy haulage hand and an adult haulage hand belonged to a different class. The true view is that the difference is one of grade and not of class and that the applicant is entitled to an increase of compensation because there had been a fluctuation in the rate of wages of haulage hands exceeding 20 per cent.

[He referred to *Brien* v. *Graydon & Co.* (1); *Bevan* v. *Energlyn Colliery Co.* (2) and *Calow* v. *Shelton Iron, Steel and Coal Co.* (3)]

F. W. Beney for the respondents. Sect. 11, sub-s. 2, of the Act of 1925 is dealing with entirely different circumstances from those in s. 11, sub-s. 3, and the infant has far wider rights under sub-s. 2 than under sub-s. 3: see *Vickers, Sons and*

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(1) 1936 S. C. 725; 29 B. W. C. C. (Supplt.) 37.

(2) [1912] 1 K. B. 63.

(3) (1928) 21 B. W. C. C. 125.

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Maxim, Ld. v. *Evans* (1) which shows that under sub-s. 2 a man may receive compensation on a review on the footing that if uninjured he would have changed his class of employment. That is what the appellant tried to accomplish in 1931, but failed. If he had succeeded, how could sub-s. 3 have been applied subsequently? The object of s. 15 of the 1923 Act (now s. 11, sub-s. 3, of the 1925) was to standardize the position shown to have been proper by *Bevan* v. *Energlyn Colliery Co.* (2) Under s. 11, sub-s. 3, regard has to be paid to actual and not notional wages before the accident and the only notional wages to be taken into account are those in the twelve months preceding the review. No great hardship is inflicted by depriving a workman injured while a boy from having a review under sub-s. 3. Under sub-s. 2 as amended the application for a review must be taken out within six months of his attaining twenty-one years of age but can relate to a review at a much later date: *Dobson Ship Repairing Co.* v. *Burton.* (3)

Again, there was not here a 20 per cent. fluctuation in the rate of wages. The boy was earning wages as a boy haulage hand when the accident happened and there has not been a 20 per cent. increase in the rate of wages as regards this class of employment. Under sub-s. 2 of s. 11 the boy can receive compensation on the footing of a change in the class of employment but not under sub-s. 3.

[He also referred to *Talbot* v. *Vickers* (*No.* 2). (4)]

R. W. Payne replied and referred to *Jones* v. *Meiros Colliery Co.* (5)

Cur. adv. vult.

1940. Feb. 28. SLESSER L.J. The judgment which I am about to read is the judgment of the Court.

The material facts of the case, which are not in dispute may be conveniently summarized as follows: (1.) On July 16,

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(1) [1910] A. C. 444; 3 B. W. C. C. 405.

(2) [1912] 1 K. B. 63; 5 B. W. C. C. 169.

(3) [1939] A. C. 590.

(4) [1925] 2 K. B. 667, 682; 18 B. W. C. C. 179.

(5) (1926) 19 B. W. C. C. 182.

1924, the applicant suffered injury by accident. He was then fourteen and a half years old and was employed as a boy haulier. His average weekly earnings were 19*s.* 4*d.* (that is 5¼ shifts at 3*s.* 3*d.* per week) and an award was made on that basis. (2.) In 1926, he returned to light work and received appropriate compensation. (3.) In March, 1931, the applicant, being still an infant in receipt of 17*s.* 7*d.* a week wages, applied for a review under s. 11, sub-s. 2, of the 1925 Act. The applicant claimed that had he remained uninjured he would probably have been earning at the time of the review the wages of a worker at the coal face. The respondents contended that he would probably have been a haulage hand earning 1*l.* 9*s.* 2*d.* (that is 3·86 shifts at 7*s.* 5½*d.* a shift). This latter view was accepted by the Court, and his pre-accident earnings thus being notionally raised to 1*l.* 9*s.* 2*d.*, his actual earnings being 17*s.* 7*d.* per week, an award was made of 8s. per week. (4.) Thereafter, owing to increases in the applicant's actual earnings, from December 4, 1938, to 1*l.* 4*s.* 4*d.* per week, the amount payable under the award fell to 3*s.* 4*d.* per week. (5.) Between a date twelve months before the last review in March, 1931 (the review under s. 11, sub-s. 2, above-mentioned) and twelve months before December, 1938 (when the compensation was reduced from 8*s.* to 3*s.* 4*d.* per week) the rates of remuneration of adult hauliers had increased by more than 20 per cent. (that is 7*s.* 5½*d.* per shift to 10*s.* 2*d.* per shift). (6.) During 1924, and for twelve months before December, 1938, the wages of boy haulier hands had not increased by more than 20 per cent. (that is 3*s.* 8*d.* per shift to 4*s.* per shift). And (7.) this conclusion is in issue—boy haulage hands are held by the judge to be in a different class from adult haulage hands.

The present claim is based primarily on s. 11, sub-s. 3, of the 1925 Act, though, as it will appear, it involves an application of s. 11, sub-s. 2, to the third sub-section, and it is put thus: It is said that in so far as there has been admittedly an increase in the rates of remuneration for adult haulage workers during the period of twelve months previous to the review of 1931 and the twelve months previous to December, 1938, from 7*s.* 5½*d.* to 10*s.* 2*d.* per shift, an increase of more than 20 per cent., this workman is now entitled to have his weekly payment varied so as to make it such as it would have been if the rates of remuneration obtaining during the twelve months previous to the present claim for review had obtained during the twelve months previous to the accident—in other words, that the pre-accident wage which has been raised notionally under s. 11, sub-s. 2, from 19*s.* 4*d.* to 1*l.* 9*s.* 2*d.* should now further be raised notionally under s. 11, sub-s. 3, from 1*l.* 9*s.* 2*d.* to 2*l.* 13*s.* 4*d.* (that is 5¼ shifts at 10*s.* 2*d.* per shift). The applicant's present wages are 1*l.* 4*s.* 4*d.* per week; this results in a deficiency due to the accident of 1*l.* 9*s.* and he claims a half of this, 14*s.* 6*d.* per week as compensation.

Sect. 11, sub-s. 3, on which the workman must ultimately rely to make good his claim, is in these terms.

[His Lordship read the sub-section.]

In order to avail himself of March, 1931, as a date of comparison to ascertain the alleged 20 per cent. increase in fluctuation of wage rates, the applicant must depend upon the variation of weekly payments on a review mentioned in the parenthesis of s. 11, sub-s. 3, and the definition of "review" in the second paragraph of the sub-section.

It is argued in the first place that this inclusive definition of the word "review," which is said to include under the words "corresponding to this section" not only the repealed s. 15 of the 1923 Act (now sub-s. 3), but also the repealed proviso to para. 16 of the First Schedule to the 1906 Act (now sub-s. 2), and also the provisions of the first part of para. 16 of the First Schedule of the 1906 Act (now sub-s. 1), is sufficiently wide to cover a review under sub-s. 2, which corresponds with the proviso to para. 16 of the First Schedule to the 1906 Act and is repealed by this Act, and that therefore the word "review" in the parenthesis of the operative words of sub-s. 3 of s. 11 of the 1925 Act ("or if the weekly payment "has been previously varied on a review") must include by definition the review obtained by the applicant in 1931, when the pre-accident wage of 1*l.* 9*s.* 2*d.* per week as a haulier was notionally attributed to him.

In our view, the argument is fallacious. The definition of the word "review" which I have cited from sub-s. 3 of s. 11 of the 1925 Act was, we think, intended solely to keep alive for purposes of comparison of rate fluctuations, reviews made under corresponding provisions before the passing of the Consolidation Act, 1925, which provisions are only to be found in s. 15 of the Workmen's Compensation Act, 1923, the language whereof is repeated verbatim in s. 11, sub-s. 3, of the 1925 Consolidation Act. One reason which supports this view arises from the necessary inclusion in sub-s. 3, on the appellant's assumption, of a review under the provisions of s. 11, sub-s. 1, which give a general right to review on a change of circumstances.

Before 1923, there were no means of obtaining a review of the notional pre-accident wage on the ground of fluctuation of wages; the review producing a notional pre-accident wage on the basis of infancy dates back to 1906, but a general fall in wages constitutes, among other matters, a change of circumstances entitling the employers to a review under s. 11, sub-s. 1, as a rise of wages may entitle a workman to a review: see *Tarr* v. *Cory Brothers & Co.* (1); but such a general right to review is, of course, entirely different from the notional raising or lowering of the pre-accident wage produced by s. 15 of the 1923 Act.

Yet, on the appellant's argument a review under s. 11, sub-s. 1, equally with a review under s. 11, sub-s. 2, would be by definition a review under s. 11, sub-s. 3, from the date of which might be ascertained the percentage change in rate fluctuations.

Another objection to the appellant's case is that the purpose of an infant's review under s. 11, sub-s. 2, is to produce a notional pre-accident figure, based on a probability of earning at the date of review if the infant had remained uninjured; a review under sub-s. 3 is to produce a notional pre-accident figure based upon its being proved that if the workman had remained uninjured and continued in the same employment there would actually have been the necessary fluctuation in rates of remuneration.

(1) [1917] 2 K. B. 774.

Sect. 15 of the 1923 Act, now re-enacted in s. 11, sub-s. 3, of the 1925 Act, was intended to give a limited statutory recognition to the decision in *Bevan* v. *Energlyn Colliery Co.* (1) in the case of fluctuation of wages, and is a provision entirely separate from any other right to review. We agree with the learned county court judge in his conclusion that the review mentioned in s. 11, sub-s. 3, is limited to that class created by the sub-section itself. It is to be noted that s. 15 of the Act of 1923 speaks in terms of review under "this "section"; and but for the change in the ambit of the word "section" in s. 11, sub-s. 3, of the 1925 Act, so as to make it possible to argue that it appears to include the provisions of sub-ss. 1 and 2, the contention as to the extended meaning of the word "review" before 1925 to include the review of 1931 would have been impossible.

It follows that the Act of 1925, which is merely a Consolidation Act, when it defines "review" in s. 11, sub-s. 3, does not alter the position as it existed before that Act. It follows that in this case there never has been any review under s. 11, sub-s. 3, before the claim in this case—the infant's review in 1931 must be disregarded—and therefore the case now falls to be considered as if the parenthesis in s. 11, sub-s. 3, had no application.

The result is that the only two dates to be considered are, first, the date of the accident in 1924, when the applicant was a boy haulier; and, secondly, the twelve months before 1938.

In order to make the comparison of fluctuation required by s. 11, sub-s. 3, of the 1925 Act, it is necessary that the workman should be considered not only to have been uninjured but also to have "continued in the same class of employment." In 1924, it is found by the learned county court judge, he was in the class of boy hauliers—a class as different from that of adults as apprentices may be from journeymen: see *Brien* v. *Graydon & Co.* (2) If he is to be deemed to have continued in that boy class in 1938 the fluctuations in rate would have been less than 20 per cent. (see the learned county court judge's finding); if, to take a view corresponding more nearly to actual facts, he has passed from the class of boy haulier to that of adult haulier, then he has not continued in the same class. His notional pre-accident wage, having been settled as a result of the application under s. 11, sub-s. 2, on his claim for review made within six months after the workman attained the age of twenty-one years (Workmen's Compensation Act, 1926, s. 1) no further review is possible. His notional pre-accident wage is irrevocably fixed. This we think is implicit in the decision of the House of Lords in *Dobson Ship Repairing Co.* v. *Burton* (1), and any further change is due to a decreasing difference between the pre-accident wage so notionally fixed and the increase in his actual wage due to his increasing age.

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(1) [1912] 1 K. B. 63; 5 B. W. C. C. 169.

(2) 1936 S. C. 725; 29 B. W. C. C. (Supplt.) 37.

This appeal must therefore be dismissed with costs.

Appeal dismissed.
Leave to appeal to House of Lords refused.

Solicitors: *Corbin, Greener & Cook, for Raley & Sons, Barnsley; Barlow, Lyde & Gilbert, for Day & Yewdall, Leeds.*

(1) [1939] A. C. 590.

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—— *Branson, In re* [1914] 2 K. B. 701. Applied. Clark *v.* Smith **C. A. 126**

—— *British American Continental Bank, Ld., Credit General Liegeois' Claim, In re* [1922] 2 Ch. 589. Approved and followed. Madeleine Vionnet et Cie *v.* Wills **C. A. 72**

—— *Caledonian Heritable Estates, Ld.* v. *Methven* 1927 S. C. 39. Distinguished. Holt *v.* Dawson **C. A. 46**

—— *Caswell* v. *Powell Duffryn Associated Collieries, Ld.* [1940] A. C. 152. Applied. Stimpson *v.* Standard Telephones & Cables, Ld. **C. A. 342**

—— *Chisholm* v. *London Passenger Transport Board* [1939] 1 K. B. 426. Applied. Wilkinson *v.* Chetham-Strode - - **Asquith J. 309**

—— *Cole* v. *Amalgamated Anthracite Collieries, Ld.* (1933) 26 B. W. C. C. 560. Followed. Evans *v.* Oakdale Navigation Collieries, Ld. **C. A. 702**

—— *Cottingham* (*Executors*) v. *Inland Revenue Commissioners* [1939] 1 K. B. 250. Followed. Macdonald *v.* Inland Revenue Commissioners **Macnaghten J. 802**

—— *Davies* v. *Davies* [1928] 1 K. B. 364. Followed. Haile and Others *v.* West - - - - **C. A. 250**

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—— *Giles* v. *Walker* (1890) 24 Q. B. D. 656. Applied. Rouse *v.* Gravelworks, Ld. - - - - **C. A. 489**

—— *Graff* v. *Evans* (1882) 8 Q. B. D. 373. Applied. Trebanog Working Men's Club and Institute, Ld. *v.* Macdonald. Monkwearmouth Conservative Club, Ld. *v.* Smith **Div. Ct. 576**

—— *Gray* v. *Lord Ashburton* [1917] A. C. 26. Applied. Rouse *v.* Gravelworks, Ld. - - - - **C. A. 489**

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—— *Hurdman* v. *North Eastern Ry. Co.* (1878) 3 C. P. D. 168. Distinguished, but principle applied. Rouse *v.* Gravelworks, Ld. **C. A. 489**

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—— *Lake* v. *Simmons* [1927] A. C. 487. Dictum of Viscount Haldane at p. 501 applied. Sowler *v.* Potter **Tucker J. 271**

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—— *Perkins* v. *Hugh Stevenson & Sons, Ld.* [1940] 1 K. B. 56. Distinguished. Stimpson *v.* Standard Telephones & Cables, Ld. **C. A. 342**

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—— *Perkins* v. *Hugh Stevenson & Sons, Ld.* [1940] 1 K. B. 56. Distinguished. Observations by MacKinnon L.J. and Goddard L.J. on dicta in. Unsworth *v.* Elder Dempster Lines, Ld. **C. A. 658**

—— *Ramsay* v. *Margrett* [1894] 2 Q. B. 18. Distinguished and discussed. Youngs *v.* Youngs. Baker, Claimant - - - - **C. A. 760**

—— *Russell* v. *Russell* [1924] A. C. 687. Rule in, held not to apply. Rex *v.* Carmichael - - **C. C. A. 630**

—— *St. Anne's Well Brewery Co.* v. *Roberts* (1928) 44 T. L. R. 703. Discussed. Wringe *v.* Cohen **C. A. 229**

—— *Selwood* v. *Townley Coal and Fireclay Co.* [1940] 1 K. B. 180. Distinguished. Unsworth *v.* Elder Dempster Lines, Ld. **C. A. 658**

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—— *Thompson* v. *London and North Eastern Ry. Co.* [1935] 2 K. B. 90. Distinguished. Evans *v.* Oakdale Navigation Collieries, Ld. **C. A. 702**

—— *Toulmin* v. *Millar* (1887) 58 L. T. 96. Rule stated by Lord Watson applied. G. T. Hodges & Sons *v.* Hackbridge Park Residential Hotel, Ld. - - - **C. A. 404**

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